**IN THE FAIR WORK COMMISSION**

**IN THE MATTER OF: Application by Nathan Fox**

**Section:** **s.157 – FWC may vary etc. modern awards if necessary to achieve modern awards objective**

**Subject:** **Real Estate Industry Award 2020**

**Matter No.:** **AM2020/23**

**SUBMISSIONS FOR REEF & REEFSANT**

1. These are the submissions of the Real Estate Employers' Federation (**REEF**) and Real Estate Employers' Federation of South Australia and the Northern Territory (**REEFSANT**) in reply to the Application made by Mr Nathan Fox to vary the Real Estate Industry Award 2020 (the **Award**).
2. These submissions are filed in accordance with the direction of the Fair Work Commission (the **Commission**) made on 9 June 2020.

**Statutory Considerations - Section 157**

3. This application is made pursuant to section 157 of the *Fair Work Act* 2009 (Cth) (the **Act**).
4. Section 157 empowers the Commission to vary modern awards if necessary to meet the modern awards objective.

5. The modern awards objective requires the Commission to ensure that modern awards, together with the National Employment Standards (**NES**), provide a fair and relevant minimum safety net of terms and conditions generally and having regard to the matters set out in section 134(1) of the Act.

**Statutory Considerations - Section 134**

6. The notion of the safety net must always be contextually calibrated.

7. The Commission may make a determination varying a modern award if the Commission is satisfied the determination is necessary to achieve the modern awards objective. The modern awards objective is in section 134 of the Act and provides as follows:

*'What is the modern awards objective?*

*134(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:*

*(a) relative living standards and the needs of the low paid; and*

*(b) the need to encourage collective bargaining; and*

*(c) the need to promote social inclusion through increased workforce participation; and*

*(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and*

*(da) the need to provide additional remuneration for:*

*(i) employees working overtime; or*

*(ii) employees working unsocial, irregular or unpredictable hours; or*

*(iii) employees working on weekends or public holidays; or*

*(iv) employees working shifts; and*

*(e) the principle of equal remuneration for work of equal or comparable value; and*

*(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*

*(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*

*(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.'*

*This is the **modern awards objective**.*

*When does the modern awards objective apply?*

*(2) The modern awards objective applies to the performance or exercise of the FWC's **modern award powers**, which are:*

*(a) the FWC's functions or powers under this Part; and*

*(b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.*

*Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum.*

8. The modern awards objective is to 'ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss.134(1)(a)–(h) (the **s.134 considerations**).

9. The modern awards objective is very broadly expressed.[1] It is a composite expression which requires that modern awards, together with the NES, provide 'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in ss.134(1)(a)–(h).[2] Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.[3]

10. The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.[4] No particular primacy is attached to any of the s.134 considerations[5] and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

11. It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.[6] Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.[7] In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

---

[1] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35].
[2] *Re 4 Yearly Review of Modern Awards - Penalty Rates* (2017) 265 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44].
[3] [2018] FWCFB 3500 at [21]-[24].
[4] *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56].
[5] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33].
[6] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]-[106].
[7] See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]-[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review.

12. Section 138 of the Act emphasises the importance of the modern awards objective:

> ***'Section 138 Achieving the modern awards objective***
>
> *A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.'*

13. What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[8]

**The Applicant**

14. The Applicant seeks the Award to be varied to:

    (a) prohibit the employment of commission-only employees until 1 October 2021 (**Prohibition Claim**);

    (b) in effect cease the operation of commission-only employment between 30 September 2020 and 1 October 2021 and replace it with a form of wages plus commission employment already contemplated by the Award (**Commission-Only Claim**); and

    (c) require an employer who is part of the JobKeeper scheme to in effect disregard the terms of existing contractual arrangements (countenanced by the Award) and to reduce debits in any debit/credit arrangement by the amount of the JobKeeper payment and thus pay

[8] *Shop, Distributive & Allied Employees v National Retail Association (No 2)* (2012) 205 FCR 227; *Re Victorian Automobile Chamber of Commerce & Ors* [2020] FWCFB 2367 at [88].

commission/bonuses/incentives sooner or in greater amounts than to the those not in receipt of JobKeeper and sooner or in greater amounts than would apply under existing contractual arrangements (**JobKeeper Claim**).

15. The Application is made by an individual employee (Mr Fox).
16. Section 159 (1) permits an “employee” to be an applicant to vary a modern award.
17. However, such an applicant has a materially different legitimate interest to that of a representative organisation.
18. A representative organisation’s interest arises from being entitled to represent classes of employees pursuant to its rules; usually industries or occupations.
19. An individual’s legitimate interests arise from their personal circumstances as an employee in an industry.
20. In this regard the applicant Mr Fox appears to have been employed in the Real Estate Industry exclusively in South Australia and held some office in the Real Estate Sales Person’s Association in South Australia as well as holding some role in the South Australian Magistrates and District Court.
21. Relevantly Mr Fox’s actual experience is limited to South Australia and his personal experience potentially as a current Sales Person although this is not entirely clear, and his role as Vice President of a South Australian organisation.
22. This should colour how the Commission approaches the exercise of discretion in this matter.

**The Evidence**

23. Because the variations are not self-evident, to succeed the Applicant must adduce probative evidence[9] to support that the variations to the Award are necessary to achieve the modern awards objective (ss 157 and 134).

24. The 'evidence' advanced in this case by the Applicant is:

    (a) a statement of Mr. Fox the Applicant (**Fox Statement**);

    (b) a submission by Mr. Clarke, Mr. Fox's representative in this matter, to an Australian Senate Committee (**RRESSA Submission**);

    (c) random pages from what appears to be an on-line chat forum associated with JobKeeper (**Chat Material**);

    (d) extracts of what purports to be 'Employer Alerts' from REEF to its members (**Employer Alerts**); and

    (e) (possibly) an unsigned statement of Mr. Finch (**Finch Statement**).

25. We comment on the character of this evidence below but from a reading of the material the following is self-evident, there is no probative (and in most cases no evidence at all):

    (a) evidence about the impact of the COVID-19 Pandemic (the Pandemic) on any employer or employee in the Real Estate Industry, not even Mr. Fox himself;

    (b) evidence concerning the use of JobKeeper in the Real Estate Industry;

    (c) evidence concerning the operation of JobKeeper in regard to a commission-only employee or an employee earning wages and an incentive, not even Mr. Fox; and

[9] *Re 4 Yearly Review of Modern Awards - Preliminary Jurisdictional Issues* (2014) 241 IR 189; [2014] FWCFB 1788 at [23]-[24].

(d) direct evidence from an employer or employee that could be said to support the Application or allow the the Commission to make the necessary findings to grant the Application.

**Finch Statement**

26. It is unclear if the Finch Statement is filed in this matter. If it is it should not be received as evidence in these proceedings as it is not relevant to the matter. In the alternative if it is received it should be given no weight in the matter.
27. The Finch Statement is unsigned and not an affidavit. It concerns factual assertions about something that is said to have occurred around 2011; an underpayment claim that was settled on a confidential basis.
28. It has nothing to do with the operation of JobKeeper or commission-only employees as they operate:
    (a) under the Award in its current form; or
    (b) in the context of the COVID-19 pandemic (the **Pandemic**).

**Fox Statement**

29. The Fox Statement is more submission than evidence and surprisingly contains no evidence concerning Mr Fox himself as an employee.
30. Mr. Fox asserts that he has general knowledge of the Real Estate Industry but nothing in the Fox Statement could lead to a conclusion that he is qualified to give opinion based evidence on the Real Estate Industry generally and certainly not outside of South Australia.
31. The following parts of the Fox Statement are objected to:

| Part of Fox Statement | Grounds for Objection |
|---|---|
| 1. First Paragraph starting “when” and ending “simple” | Mr. Fox has not established the basis upon which he can express an opinion for the whole “industry” in South Australia. |
| 1. Second paragraph | The reference to JobKeeper is a submission and/or a matter of law.<br>There is no basis established to assert what a “standard Agency Agreement” is or where it may or may not apply in Australia.<br>There is no basis advanced for the assertion concerning “national figures” and changes in “turnover” asserted by Mr. Fox.<br>Mr. Fox is not in a position to express an opinion on the “general consensus” and advances no basis for how he is able to form such an opinion. |
| 2. Paragraph 1. | Mr. Fox advances no basis as to how he can assert the numbers he does - “50%, 60%”. |
| 2. Paragraph 2. | This is a submission evidenced by the reference “our”. |
| 3. Paragraph 1. | This is a submission.<br>There is no basis established concerning the reference to “approximately $1,000 per week”.<br>There is no foundation for what are the “Real Estate Employers Federation Guidelines”, where they are applied and where they are not applied.<br>The example is a submission.<br>The reference to the ATO is a submission. |
| 3. Paragraph 2. | Mr. Fox advances no basis to say what the “general consensus” is. |

| | |
|---|---|
| | The rest of the paragraph is a submission. |
| Example 1 Commission Only, 2 Debit Credit, Examples of "how it should operate" | These are submission and clearly argumentative by nature. |
| Paragraph commencing "It is morally and ethically wrong…" | This is a submission.<br>There is no basis established for the reference to "85000 employees" or "50000 being licenced". |
| JB Hi Fi Example | This is a submission. |
| Other Matters, paragraph 1 starting "I have read". | This is a submission agreeing with a submission. |
| Other Matters, paragraph 2 starting with "I am aware". | Mr. Fox gives no actual evidence of this assertion or the basis upon which he can express this opinion about "many staff" and employees being "forced" to go to "commission" or "a number of sales staff earning less than the award minimum".<br>These assertions are highly prejudicial and have no probative weight.<br>The circumstances asserted to have applied in the GFC are not relevant to the current circumstances of the Pandemic. |

32. The Fox Statement is a submission, contains unsubstantiated assertions many of which are prejudicial with no probative value.

33. The Chat Material is worthless as evidence. It simply identifies random on-line comments of unidentified contributors without any understanding of their circumstances or the truth of their comments and with no way of testing the statements. It should not be admitted.

34. The Registered Real Estate Salespersons' Association of South Australia (**RRESSA**) Submission is self-serving and simply is evidence that RRESSA holds certain views and have expressed them. It should not be admitted as evidence of anything beyond this and provides no direct evidence to assist the Commission.
35. The Employer Alerts appear to be parts of member notices from REEF to its members and stand for no more than this (the full versions of these are filed with this submission). They are not a proxy for direct evidence of what an employer or employee may do or experience.
36. The evidence does not support at all or to any necessary degree the findings required to be made to fundamentally change the Award as sought by the Applicant.

**Commission-Only Claim**

37. Commission-only employment has been the subject of exhaustive consideration in the 2012 Transitional Review and the 2014, 4 Yearly Review of modern awards.[10]
38. A number of things can be concluded from this exhaustive examination of commission-only employment.

---

[10] Decision - [2019] FWCFB 2634 - *4 yearly review of modern awards—Real Estate Industry Award 2010 – 1 May 2019*;
AM2016/6 - decision - [2018] FWCFB 1882 - *4 yearly review of modern awards – AM2016/6 – Real Estate Industry Award 2010 – substantive matters – further decision. 29 March 2020*
Decision - [2018] FWCFB 1532 - *4 yearly review of modern awards – AM2016/6 – Real Estate Industry Award 2010 – substantive matters – further decision.* 16 MARCH 2018
Decision - [2018] FWCFB 354 - correction - *4 yearly review of modern awards – Real Estate Industry Award 2010 – substantive matters – classifications – work-value – commission-only employment – minimum income threshold – allowances – further correction order – Sydney 31 January 2018*
Decision - [2018] FWCFB 354 - correction – *4 yearly review of modern awards – Real Estate Industry Award 2010 – substantive matters – classifications – work-value – commission-only employment – minimum income threshold – allowances – correction order.* -25 January 2018
Decision - [2018] FWCFB 354 - *4 yearly review of modern awards – Real Estate Industry Award 2010 – substantive matters – classifications – work-value – commission-only employment – minimum income threshold – allowances.* - 17 January 2018
AM2016/6 - decision - [2017] FWCFB 3543 – *Four yearly review of modern awards – Real Estate Industry Award 2010.* - 6 July 2017
[2014] FWC 3884 - *Modern Awards 2 year review 2012 – Real Estate Industry Award 2010 amendment to various clauses, opposed in part, variations made in part – 13 June 2014*

39. Commission-only employment is an accepted method for paying certain sales persons in the Real Estate Industry.
40. Commission-only employment should not be seen as more or less controversial than any other method of paying employees in the Real Estate Industry.
41. The operation of commission-only employment is subject to rigorous safeguards both in terms of entry to such a payment method and also the retention of such persons in that payment method.
42. Entry to a commission-only employment arrangement and retention in it is conditioned by the "Minimum Income Threshold Amount" (**MITA**).[11]
43. The MITA is in effect a minimum earnings threshold that needs to be achieved and maintained.
44. Subject to meeting the entry requirements to the commission-only employment system an employee and employer may agree on the employee becoming a commission-only employee.
45. Having become a commission-only employee an employee must have their gross income reviewed annually. If the review establishes that the gross income of the commission-only employee for the year under review is less than the MITA the commission-only employment arrangement "must" cease.[12]
46. These safeguards have been only recently reset to ensure that the modern awards objective is met.
47. Commission-only employment has a particular character as has been observed by the Commission:

[11] Clause 16.7 of the Real Estate Industry Award 2020.
[12] Clause 16.7 (h) of the Real Estate Industry Award 2020.

(a) commission-only employment arrangements provide for a system of payment by results and not time based;[13]

(b) the concept of the commission-only employment system is that employees will be incentivised to perform the work necessary to obtain a sale, regardless of any notional hours of work attaching to their employment;[14] and

(c) Commission-only employment arrangements afford significant flexibility to employees and also to employers.[15]

48. In matter 2020/14 (the **REEF Matter**) REEF and REEFSANT have applied to ensure that the MITA operates fairly during the Pandemic.

49. That REEF Matter was both focussed and modest in its purpose and effect.

50. That REEF Matter arose as a direct result of the Pandemic and Government initiatives to contain the Pandemic (the **Initiatives**); employees have been prevented or materially restricted from operating normally in the pursuit of sales etc and as such may have periods where they have failed or in future may fail to achieve any sales or a substantially reduced number of sales compared to the norm through no fault of the employee.

51. The REEF Matter stands in stark contrast to the Commission-Only Claim.

52. The Commission-Only Claim is not a modest claim addressing something arising from the Pandemic or the Initiatives but rather the abolition of commission-only employment for a period and the creation of an entirely different form of employment minimum wage and commission top up.

---

[13] Decision - [2019] FWCFB 2634 - *4 yearly review of modern awards—**Real Estate Industry Award 2010** – 1 May 2019* paragraph [35].
[14] Decision - [2019] FWCFB 2634 - *4 yearly review of modern awards—**Real Estate Industry Award 2010** – 1 May 2019* paragraph [39].
[15] Decision - [2018] FWCFB 1532 - *4 yearly review of modern awards – AM2016/6 – **Real Estate Industry Award 2010** – substantive matters – further decision.* 16 MARCH 2018 paragraph [17].

53. The terms of how this would actually operate appears to be that, despite any commission-only arrangement, the employee would receive the minimum Award weekly wage (annualised).
54. This is entirely inconsistent with the notion of commission-only employment and strikes at the character of such employment.
55. There is no probative evidence to support the findings required to vary the Award as claimed.
56. There is no evidence that the current safeguards in the Award have failed; manifestly.
57. There is no evidence to support how the Pandemic or Initiatives require such a change so the Award meets the modern awards objective.
58. In fact it should be uncontroversial and self-evident that a certain number of commission-only employees will be beneficiaries of JobKeeper.
59. JobKeeper is discussed at length below but in simple terms as JobKeeper operates on a “one in, all in” basis, commission-only employees will receive a minimum $1500 a fortnight payment in circumstances where their employer is eligible for JobKeeper; they will be paid minimum fortnightly wages that would not normally have been the case (it is not possible to determine exactly how many employers in the Real Estate Industry are part of the JobKeeper scheme but we have filed with this statement the most available ABS data set that includes the Real Estate Industry).
60. In this sense where an employer is suffering material revenue impairment to trigger the relevant threshold (30%) any commission-only employees will receive some level of wages other than simply commission payments.

61. The Commission-Only Claim is offensive to section 134 and the modern awards objective.

62. In terms of the matters the Commission has regard to in setting the safety net the following is relevant to the Commission-Only Claim:

    (a) (s 134(1)(b)): The Commission-Only Claim does nothing to encourage collective bargaining;

    (b) (s 134(1)(c)): The Commission-Only Claim will do nothing to promote workforce participation as it essentially makes commission-only employment of no real benefit to employers by removing the incentive basis of this form of employment;

    (c) (s 134(1)(d)): To the extent that commission-only employment within the Real Estate Industry can be construed as a flexible modern work practice it is being discouraged not encouraged;

    (d) (s 134(1)(f)): Discouraging an employer from considering a form of employment which is a likely logical outcome, even for a limited period of time, will to some extent negatively impact the options available to business (and employers and employees) for employment creation. Unambiguously such a claim will to some extent increase costs and regulatory burden through added administration; and

    (e) (s 134(1)(h)): While it may be modest, discouraging an accepted form of employment in the Real Estate Industry offends the notion of employment growth contemplated by this section.

63. The other elements of section 134 (1) are either not relevant to the Commission-Only Claim or are of neutral consideration.

64. This claim should be dismissed.

**Prohibition Claim**

65. This is an extraordinary claim.

66. For a period of time the Award would prohibit a form of employment, which it specifically contemplates.

67. For such a claim to succeed the Applicant would in effect have to demonstrate (based on probative evidence) that the form of employment to be prohibited was manifestly inconsistent with section 134 and the modern awards objective.

68. They would also need to prove that the many safeguards built around commission-only employment as part of the 4 Yearly Review are a failure resulting in some manifest injustice offending the notion of the safety net.

69. Rather than insufficient evidence on these matters there is simply no evidence probative of the findings required to be made to reach these conclusions.

70. In fact, the Prohibition Claim is offensive to section 134 and the modern awards objective.

71. In terms of the matters the Commission has regard to in setting the safety net the following is relevant to the Prohibition Claim:

    (a) (s 134(1)(b)): The Prohibition Claim does nothing to encourage collective bargaining;

    (b) (s 134(1)(c)): The Prohibition Claim will most likely decrease workforce participation or do nothing to promote workforce participation;

    (c) (s 134(1)(d)): To the extent that commission-only employment within the Real Estate Industry can be construed as a flexible modern work practice it is being discouraged not encouraged;

    (d) (s 134(1)(f)): Prohibiting a form of employment well established within the Real Estate Industry, even for a limited period of time, will to some extent

negatively impact the options available to business (and employers and employees) and in circumstances where an employer and employee would otherwise meet all other commission-only requirements and be prepared to agree to work on commission-only, increase costs and regulatory burden than would otherwise be the case save for the prohibition.

(e) (s 134(1)(h)): While it may be modest, prohibiting an accepted form of employment in the Real Estate Industry offends the notion of employment growth contemplated by this section.

72. The other elements of section 134(1) are either not relevant to the Prohibition Claim or are of neutral consideration.

73. This claim should be dismissed.

**The JobKeeper Claim**

74. A number of matters should be uncontroversial in considering this claim given the current content of the Award and the cases and decisions cited above concerning the Award.

75. Real estate agencies receive income principally in the form of commission for the selling of a client's home, business or investment property, which is paid at the time of settlement/completion and typically consists of a percentage of the sales price.

76. It is a success-based fee, which is not payable, in whole or in part, if the agency does not sell the property.

77. The real estate industry is by nature an incentive-driven industry.

78. Putting aside commission-only employment, a real estate salesperson is remunerated by the payment of wages and allowances and where the employer and employee agree, this minimum remuneration can be complemented by an

entitlement to commission/incentive/bonus based[16] on the individual performance of the employee.

79. This entitlement constitutes an over-award entitlement and any entitlement to additional remuneration (commonly known as “sales commission”) will be determined in accordance with the individual employee’s contract of employment.

80. There are two main methods by which a salaried-plus-commission real estate salesperson will be incentivised. These are:

    (a) debit-credit; and

    (b) target.

**Debit-Credit**

81. “Debit-credit” is a system whereby each month a salesperson is ‘credited’ with an agreed percentage of the net commission they generate in the month from the component(s) of a property sale(s).

82. From this credit calculation, the costs associated with employing the salesperson are debited.

83. Once the debiting of employment-based payments and other agreed amounts has been undertaken, the employee’s commission account will either be in debit (i.e. the employee has not generated sufficient sales commission to be entitled to any additional remuneration) or it will be in credit (i.e. the employee has generated sufficient sales commission to become entitled to additional remuneration). Where there is a ‘credit’ resulting from the calculation, this amount then becomes an amount payable to the employee.

[16] Refer clause 16 of the Award.

84. If the salesperson has been paid more by way of employment-based entitlements than is credited to them from settled sales, the negative balance carries over to the next period (usually a month) and the calculations start again for that month using the negative balance as the starting point for the notional balance in the commission account.

**Target**

85. As the name suggests, under the Target system the employer sets a target of net commission that the employee must generate before there is an entitlement to receive sales commission.
86. The employee is credited with a total amount of net commission from the components of each property transaction for which they were responsible. Commission is only payable to the employee after the agreed target has been exceeded.
87. It would appear that the Application would have the following effect (but this is not entirely clear).
88. The language in the Application is imprecise as employees do not receive payments from their employer pursuant to the relevant JobKeeper legislation. They receive wages in the ordinary sense but there is a minimum wages threshold required to be paid to an employee for the employer to access JobKeeper (this is discussed at length below).
89. Putting this aside for the moment, the effect intended by the JobKeeper Claim seems to be that where an employer receives JobKeeper in regard to an employee if that employee is:

(a) paid on the basis of wages and sales commission (clause 14 and 16 of the Award) then the value of the JobKeeper payment ($1500 a fortnight) cannot be debited from the notional commission account;

(b) paid on the basis of commission only (clause 16 of the Award) then the value of the JobKeeper payment ($1500 a fortnight) cannot be debited from something; commission-only employees do not have a notional commission account operated on a debit/credit basis.

90. The latter operation of the JobKeeper Claim appears open on the terms of the claim but unlikely to operate in practice. It is also not clear how this element operates alongside the Commission-Only Claim.

91. This aside, this begs the following questions:

(a) Is the variation required for the Award to meet the modern awards objective?

(b) Has the Commission been provided with probative evidence to make the requisite findings to arrive at this conclusion?

(c) Does the JobKeeper Claim misconstrue the proper purpose of the JobKeeper scheme?

(d) Does the JobKeeper Claim undermine the proper purpose of the JobKeeper scheme?

92. We start a consideration of these issues with a consideration of the JobKeeper scheme.

93. What can be described broadly as the JobKeeper scheme was first announced by the Commonwealth Government in late March 2020. Relevantly, it contains two elements. Principally, the scheme involves the payment by the Australian Tax Office to qualifying entities of an amount to subsidise the antecedent payment of

wages by employers to employees. Secondly, the scheme contains consequential amendments to the Act, enabling qualifying employers to give certain directions to their employees and come to agreement on certain matters with them.

94. The legislative framework of the two aspects of the Scheme are as follows.

95. First, the payment of the subsidy itself is enabled under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth) (**Payments and Benefits Act**). The Payments and Benefits Act enables the making of rules in relation to payments by the Commonwealth to an entity and a scheme in relation to the payment, including with respect to eligibility criteria, and entitlement to and amount of payment (s 7). JobKeeper Payments were specifically contemplated to be made under the framework established by the Payments and Benefits Act.[17]

96. *The Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) (**Payment Rules**) consist of the legislative rules by which entitlement to payment of the JobKeeper subsidy is determined. Under the Payment Rules, an employer which has suffered from substantial decline in turnover can be entitled to payment of $1500 per fortnight for each eligible employee, who must have received from the employer at least that amount in salary or wages (including commission, bonuses or allowances - s 10(2)(a)) for the relevant fortnight (s 5). The Payment Rules thus set out qualifying criteria for the entity to receive the payment and other conditions which must be satisfied, including the wage condition (s 6). The Payment Rules have been amended several times concerning notice to ADIs,[18] the so-called 'one-in, all-in' rule, extension of the scheme to certain charities and religious practitioners, and modification of the decline in turnover test for certain group

[17] *Explanatory Memorandum to the Coronavirus Economic Response Package (Payments and Benefits) Bill 2020, Coronavirus Economic Response Package Omnibus (Measures No 2) Bill 2020* at 2.5 (p 33).
[18] *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No 1) 2020* and *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No 4) 2020*.

structures and eligibility criteria for children, inter alia;[19] and universities.[20] Another instrument has also been promulgated, which sets out alternative decline in turnover tests for certain classes of entities.[21]

97. The second key aspect of the Scheme is the new Part 6-4C of the Act, which was inserted by the *Coronavirus Economic Response Package Omnibus (Measures No. 2)* Act 2020 (Cth).

98. Part 6-4C of the Act is of limited duration. Its Object is, broadly speaking, to encourage job retention, business viability, employment continuity and workplace participation (in the sense of employees remaining productively employed and contributing to their employers' business) (s 789GB). It enables an employer, which "qualifies for the JobKeeper scheme", to give directions concerning stand down, duties and location and come to agreement with their employees concerning when work is performed and the taking of annual leave (s 789GA). It requires relevant employers to satisfy the wage condition, as that condition is understood in s 10 of the Payment Rules (s 789GD; s 789GC).

99. Part 6-4C of the Act interacts with the Payments and Benefits Act and Payment and Benefit Rules. Part 6-4C operates with respect to an employer which "qualifies for the JobKeeper scheme". That expression is defined in Part 6-4C as having the same meaning as in the "JobKeeper payment rules", which is a reference to the rules made under the Payments and Benefits Act, namely the Payment Rules (s 789GC). Section 7 of the Payment Rules sets out when an employer will qualify for the JobKeeper scheme, including by reference to the decline in turnover test (s

[19] *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No 2) 2020*.
[20] *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No 3) 2020*.
[21] *Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Rules 2020*.

7(1)(b); s 6(1)(b)). Thus, Part 6-4C of the Act will operate with respect to employers which qualify for the JobKeeper payment scheme under the Payment Rules.

100. In the Explanatory Statement to the Payment Rules it states at page 2 that:

*By temporarily offsetting wage costs, the JobKeeper scheme supports businesses to retain staff – and continue paying them – despite suffering decreased turnover during this period of downturn. The payment also supports these businesses to recommence their operations or scale up operations quickly without needing to rehire when the downturn is over.*[22]

101. This is the essential purpose of the JobKeeper scheme. It provides a certain level of financial support to a business that has experienced material impairment to its revenue on a year for year comparison provided that it maintains the employment of its employees and pays them a minimum amount of remuneration.

102. The Payment Rules identify seven conditions that must be met for an employer to be entitled to a JobKeeper payment. The conditions are:

(a) the fortnight during which an employer is entitled to a JobKeeper payment is a "JobKeeper fortnight": Payment Rules s 6(1)(a);

(b) the employer qualifies for the JobKeeper scheme at or before the end of the fortnight: Payment Rules s 6(1)(b);

(c) the individual is an "eligible employee" of the employer for the fortnight: Payment Rules s 6(1)(c);

(d) the employer has satisfied the "wage condition" for the fortnight: Payment Rules s 6(1)(d);

[22] Registered on 9 April 2020 to F2020L00419.

(e) the employer has elected, by notifying the Commissioner of Taxation in the approved form, prior to the relevant deadline, to participate in the JobKeeper scheme: Payment Rules s 6(1)(e);

(f) the employer has given information about the entitlement for the fortnight, including details of the individual, to the Commissioner in the approved form: Payment Rules s 6(1)(f); and

(g) the employer has not notified the Commissioner, using the approved form, that they no longer wish to participate in the JobKeeper scheme: Payment Rules s 6(1)(g).

**JobKeeper fortnights**

103. JobKeeper fortnights are defined in section 6(5) of the Payment Rules and cover fortnight periods from 30 March to 27 September.

**Employer qualification for the JobKeeper scheme**

104. To qualify for the JobKeeper scheme, section 7 of the Payment Rules provides that the employer must:

(a) have been carrying on a business in Australia, or be a non-profit body pursuing its objectives principally in Australia or as a deductible gift recipient of a prescribed kind on 1 March 2020; and

(b) have suffered a decline in turnover at the time their eligibility is being assessed (which must be at or before the end of a JobKeeper fortnight in respect of which a claim is made).

**Revenue Impairment**

105. The required impairment in revenue is:

(a) in most cases, 30%: Payment Rules s 8(2)(c);

(b) for larger businesses (with aggregated turnover likely to exceed $1 billion in that income year at the time their qualification for the scheme is being tested, or with aggregated turnover in fact exceeding $1 billion in the previous income year), 50%: Payment Rules s 8(2)(b) and (4); and

(c) for charities registered under the Australian Charities and Not-for-profits Commission Act 2012 (Cth) other than schools or certain higher education providers, 15%: Payment Rules s 8(2)(a) and (3).

106. Employers are only entitled to JobKeeper payments in respect of individuals who meet the following requirements:

(a) they were an employee of the employer during the relevant fortnight (Payment Rules s 9(1)(a));

(b) as at 1 March 2020, they were 16 years or over (Payment Rules s 9(1)(b) and (2)(a)) (and as at 1 March 2020, if they were 16 or 17 years the individual was independent for the purposes of the *Social Security Act* 1991 and not undertaking full-time study (s 9(1)(b) and (2)(aa));

(c) as at 1 March 2020, they were an employee of the employer (Payment Rules s 9(1)(b) and (2)(b)(i));

(d) as at 1 March 2020, they were not a casual employee, unless they were a “long term casual employee” of the employer (Payment Rules s 9(1)(b) and (2)(b)(i) and (ii));

(e) as at 1 March 2020, they were an Australian resident or an Australian tax resident holding a special category visa (Payment Rules s 9(1)(b) and (2)(c));

(f) the individual has given their employer a notice in the approved form certifying certain matters (the "nomination notice") (Payment Rules s 9(1)(b) and (3)(a), (aa) and (b)); and

(g) the individual is not excluded from being an eligible employee (Payment Rules s 9(1)(c) and (4)).

**The "one in, all in" principle**

107. The Explanatory Statement that accompanied the Payment Rules included this statement (at p 5):

> *Once an employer decides to participate in the JobKeeper scheme and their eligible employees have agreed to be nominated by the employer, the employer must ensure that all of these eligible employees are covered by their participation in the scheme. This includes all eligible employees who are undertaking work for the employer or have been stood down. The employer cannot select which eligible employees will participate in the scheme. This 'one in, all in' rule is a key feature of the scheme.*

108. On 1 May 2020, section 10A(1) was inserted by the *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 2) 2020* (**Payment Rules (Amendment No 2)**), requiring an employer electing to participate in the JobKeeper scheme to notify each individual who is employed by it on the day the employer notifies the Commissioner of its election.

109. In simple terms an employer cannot select employees for JobKeeper but must instead invite all eligible employees to participate.

**Eligible businesses**

110. There is no restriction as to the legal form of an employing entity for the purpose of qualifying for the scheme. Employing entities may comprise individuals in business as sole traders, partnerships, or bodies corporate (including corporations). A number of businesses are, however, expressly not eligible for the scheme such as banks and government agencies.

**The individual was an employee during the relevant fortnight**

111. JobKeeper payment entitlements are calculated on the basis of fortnights. If the person was not an employee of the employer during a particular fortnight, the employer is not entitled to payment for that employee in that fortnight.

**Employee of the employer as at 1 March 2020**

112. The object of the JobKeeper scheme is to preserve jobs that might otherwise be lost as a consequence of the Pandemic. Employers cannot claim in respect of individuals whom they did not already employ on 1 March 2020.

113. Further, the fact that the assessment takes place at 1 March 2020 means that it is open to an employer to rehire an employee whose employment was terminated after 1 March 2020, and to retain that employee using payments made under the JobKeeper scheme (the Explanatory Statement to the Payment Rules expressly contemplates such an arrangement: at p 13).

**The "wage condition"**

114. The "wage condition" is found in the Payment Rules, s 10.

115. The “wage condition” requires an employer to pay the employee at least $1,500 for the relevant fortnight. This applies to all employees. The Explanatory Statement to the Payment Rules offers four useful examples (at p 18):

*… if an employee:*

- *ordinarily receives $1,500 or more in income per fortnight before PAYG withholding and other salary sacrificed amounts, and their employment arrangements do not change they will continue to receive their regular income according to their workplace arrangements. The JobKeeper payment will assist the employee to continue to receive their regular income according to their workplace arrangements. The JobKeeper payment will assist the employer to continue operating by subsidising all or part of the income of the employee;*
- *ordinarily receives less than $1,500 in income per fortnight before PAYG withholding and other salary sacrificed amounts, the employer must pay the employee at least $1,500 per fortnight, subject to PAYG withholding and other salary sacrificed amounts to the value of $1,500;*
- *has been stood down, the employer must pay the employee at least $1,500 per fortnight, before PAYG withholding and other salary sacrificed amounts to the value of $1,500; or*
- *was employed on 1 March 2020, subsequently ceased employment with the employer, and then has been rehired by the same eligible employer, the employer must pay the employee at least $1,500 per fortnight, before PAYG withholding and other salary sacrificed amounts to the value of $1,500.*

116. Eligibility for JobKeeper payments depends on the wage condition having been met. This means that JobKeeper payments are made in arrears and, for employers to be eligible for the payment, they must have already paid at least

$1,500 during the relevant fortnight to any employees for whom they are claiming the payment.

117. The payment of $1,500 can be made up from the following amounts (Payment Rules, s 10(2)):

(a) salary/wages/commission/bonuses/allowances paid in the fortnight; and

(b) superannuation contributions (but only if made under a salary sacrifice arrangement) made within the fortnight.

118. It is worthwhile considering the JobKeeper Claim in the context of an example.

**Example**

119. Prior to JobKeeper an employee may have operated on the basis of wages and then a debit/credit incentive sales commission system.

120. In this example the employee would have had an amount corresponding to their wages notionally placed in the debit/credit account as a debit. The purpose of this is to ensure that the employees labour costs are deducted from any credits placed in the debit/credit account. The incentive is then a periodic payment based (on agreed terms) on any positive net balance in the debit/credit account.

121. Such an arrangement is required by clause 16 of the Award to be recorded in writing where the employer and employee agree on such a scheme.

122. Clause 16.2 requires any change to an existing arrangement to be further set out in writing once it is agreed to.

123. The first thing that is evident from the Award is that the Commission has as a matter of discretion left commission, bonus and incentive payments paid in addition to the minimum weekly wage etc. to the employer and employee.

124. The Commission has not to date seen fit to regulate how such an arrangement should in terms operate; leaving it to the contracting parties.

125. The JobKeeper Claim seeks the Commission to invade this space for the first time.

126. This is an issue of principle; is the situation such that this is the point where this threshold is crossed?

127. What practical administrative issues will this give birth to as employers seek to reconcile the JobKeeper Claim against their individual contractual arrangements?

128. These obvious and uncontroversial considerations should weigh heavily against the JobKeeper Claim.

129. If we examine the example a little further there is an equity issue that also weighs against the JobKeeper Claim.

130. This arises when considering that:

    (a) employees are no worse off under JobKeeper than not being under JobKeeper in terms of any debit/credit arrangement;

    (b) if the JobKeeper Claim is granted there will be inequity between employees;

    (c) if granted some employers will be disadvantaged in a way not contemplated by JobKeeper.

131. The first of these propositions should be self-evident. JobKeeper is a business support/stimulus package (designed to subsidise the cost of employment to promote it being maintained) if we consider the example above and place it in the context of an employer in receipt of JobKeeper and one who is not the employee is in no different a situation.

132. In the first case the employee has their wages debited to the debit/credit account. In the second case the employee has their wages debited to the debit/credit account; no injury befalls the employees in either case.

133. If the JobKeeper Claim is granted this level playing field is up ended.

134. An employee working for an employer who is not part of the JobKeeper scheme (and this could be by a fine margin; 29% revenue impairment to the required 30%) will debit wages from the debit/credit account as normal.

135. An employee working for an employer who is part of the JobKeeper scheme (and this could be by a fine margin the other way; 30% revenue impairment to 29%) will not debit wages from the debit/credit account as normal and in so doing will likely have commission payments made when they would not ordinarily be made; an extra (or earlier) payment as there are fewer debits in the debit/credit account.

136. This extra or earlier payment will need to be funded from somewhere; in effect cash flows from the business which indirectly means the employer will not get the full benefit of JobKeeper as intended.

137. The employer was meant to get the $1500 subsidy for maintaining employment not $1500 minus some extra commission payment not otherwise required to be paid by the Award or the employment contract.

138. These inequities are unsatisfactory features of a fair and relevant minimum safety net and a misuse of JobKeeper.

139. The Applicant has referred to section 789GDA but is misplaced in advancing this as an aid.

140. This section of the FW Act simply sets out an explanation of the minimum payments an employee must receive; the minimum payment guarantee. This is

simply a comparison of the $1500 or the amount actually earned with a broad definition discussed above as to what this includes.

141. Also section 789GDA is relevant only to the extent that an employer wants to issue a JobKeeper Direction. There is no evidence of any such Directions being issued in this matter or their relevance.

142. In terms of the matters the Commission has regard to in setting the safety net the following is relevant to the JobKeeper Claim:

(a) (s 134(1)(b)): The JobKeeper Claim does nothing to encourage collective bargaining;

(b) (s 134(1)(c)): The JobKeeper Claim will do nothing to promote workforce participation. In fact it may discourage employers from employing people during a critical period of business challenge. It also robs employers of the full JobKeeper benefit which was designed to support business viability for businesses in an egregious commercial position (30% revenue impairment or worse).

(c) (s 134(1)(d)): To the extent that commission/bonus incentives within the Real Estate Industry can be construed as a flexible modern work practice they are being discouraged not encouraged through added administration and cost;

(d) (s 134(1)(f)): Unambiguously such a claim will to some extent increase costs and regulatory burden through added administration.

143. The other elements of section 134 (1) are either not relevant to the JobKeeper Claim or are of neutral consideration.

144. Let us return to the questions posed earlier:

(a) Is the variation required for the Award to meet the modern awards objective?

No.

(b) Has the Commission been provided with probative evidence to make the requisite findings to arrive at this conclusion?

No.

(c) Does the JobKeeper Claim misconstrue the proper purpose of the JobKeeper scheme?

Yes.

(d) Does the JobKeeper Claim undermine the proper purpose of the JobKeeper scheme?

Yes.

145. The JobKeeper Claim should be dismissed.

For the Applicants

**Nigel Ward**
**CEO + Director**
Australian Business Lawyers & Advisors Pty Limited
(02) 9458 7286
nigel.ward@ablawyers.com.au

**David Collits**
**Associate**
Australian Business Lawyers & Advisors Pty Limited
02 9458 7355
David.Collits@ablawyers.com.au

# Coronavirus Economic Response Package (Payments and Benefits) Act 2020

# No. 37, 2020

## An Act to provide an economic response, and deal with other matters, relating to the Coronavirus, and for related purposes

Note: An electronic version of this Act is available on the Federal Register of Legislation (https://www.legislation.gov.au/)

# Contents

# Coronavirus Economic Response Package (Payments and Benefits) Act 2020

**No. 37, 2020**

## An Act to provide an economic response, and deal with other matters, relating to the Coronavirus, and for related purposes

[*Assented to 9 April 2020*]

The Parliament of Australia enacts:

## 1 Short title

This Act is the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*.

## 2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

**Commencement information**

| Column 1 | Column 2 | Column 3 |
|---|---|---|
| **Provisions** | **Commencement** | **Date/Details** |
| 1. Sections 1 and 2 and anything in this Act not elsewhere covered by this table | The day this Act receives the Royal Assent. | 9 April 2020 |
| 2. Sections 3 to 20 | The provisions do not commence at all unless Part 1 of Schedule 1 to the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* has commenced, in which case they commence immediately after the commencement of that Part. | 9 April 2020 |

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

## 3 Object of this Act

The object of this Act to is to provide financial support to entities directly or indirectly affected by the Coronavirus known as COVID-19.

## 4 Application to external Territories

This Act extends to every external Territory referred to in the definition of ***Australia*** (within the meaning of section 960-505 of the *Income Tax Assessment Act 1997*).

## 5 General administration of this Act

The Commissioner has the general administration of this Act.

Note: An effect of this provision is that people who acquire information under this Act are subject to the confidentiality obligations and exceptions in Division 355 in Schedule 1 to the *Taxation Administration Act 1953*.

## 6 Definitions

In this Act:

***approved form*** has the meaning given by section 388-50 in Schedule 1 to the *Taxation Administration Act 1953*.

***Australia*** has the same meaning as in section 960-505 of the *Income Tax Assessment Act 1997*.

***Commissioner*** means the Commissioner of Taxation.

***Coronavirus economic response payment*** is the collective name for all of the kinds of payments provided for by the rules.

Note: Particular kinds of payments provided for by the rules may also have a particular name for that kind of payment.

***entity*** has the meaning given by the *Income Tax Assessment Act 1997*.

***general interest charge*** means the charge worked out under Part IIA of the *Taxation Administration Act 1953*.

***income tax return*** has the meaning given by the *Income Tax Assessment Act 1997*.

***income year*** has the meaning given by the *Income Tax Assessment Act 1997*.

***prescribed period*** means the period between 1 March 2020 and 31 December 2020.

***this Act*** includes the rules.

## 7 Coronavirus economic response payments

(1) The rules may make provision for and in relation to:

(a) one or more kinds of payments by the Commonwealth to an entity in respect of a time that occurs during the prescribed period; and

(b) the establishment of a scheme providing for matters relating to one or more of those payments, and matters relating to such a scheme.

Paragraphs (a) and (b) do not limit each other.

(2) Without limiting subsection (1), the rules may make provision for and in relation to the following matters:

(a) the eligibility criteria for a payment;

(b) if or how an application for a payment may or must be made;

(c) whether a payment is to be paid in instalments or as a lump sum;

(d) entitlement to a payment or an instalment of a payment;

(e) the amount of a payment or an instalment of a payment;

(f) when a payment or an instalment of a payment is payable;

(g) conditions applying to a payment or an instalment of a payment;

(h) providing information or notices;

(i) rights, obligations or liabilities of:

(i) an entity that is paid a payment; or

(ii) an entity that directly benefits from another entity being paid a payment; or

(iii) if the entitlement of an entity to a payment relates to a relationship existing between the entity and another entity—the other entity.

Paragraphs (a) to (i) do not limit each other.

## 8 Method of paying Coronavirus economic response payments

(1) If, under the rules, the Commissioner is required to pay a Coronavirus economic response payment to an entity, the Commissioner must pay the payment to the credit of:

(a) if the entity has nominated a financial institution account as referred to in section 8AAZLH of the *Taxation Administration Act 1953*—that account; or

(b) if paragraph (a) does not apply—the financial institution account nominated by the entity in the entity's most recent income tax return lodged for an income year.

(2) However, the Commissioner may direct that the payment be paid to the entity in a different way.

(3) If the entity has not nominated a financial institution account as mentioned in subsection (1) and the Commissioner has not directed that the payment be paid in a different way, the Commissioner is not obliged to pay the payment to the entity until the entity does so.

(4) If the Commissioner pays a payment to the credit of a financial institution account nominated by an entity, the Commissioner is taken to have paid the payment to the entity.

## 9 Overpayments etc.

(1) This section applies if:

(a) the Commissioner pays an amount by way of a Coronavirus economic response payment to an entity; and

(b) either:

(i) the entity was not entitled to the payment; or

(ii) the amount paid is more than the correct amount of the entity's payment.

(2) The entity is liable to repay the following amount to the Commonwealth:

(a) if the entity was not entitled to the payment—the whole of the amount referred to in paragraph (1)(a);

(b) if the amount paid is more than the correct amount of the entity's payment—the amount by which the amount paid exceeds the correct amount.

(3) An amount that an entity is liable to repay under subsection (2) is due and payable on the day on which the Commissioner pays the amount referred to in paragraph (1)(a).

(4) The Commissioner may make a written determination that the entity is not liable to repay an amount under subsection (2), in which case the entity is not liable to repay the amount.

(5) A determination under subsection (4) is not a legislative instrument.

## 10 General interest charge on overpayment debts

(1) If:

(a) an entity is liable under subsection 9(2) to repay an amount; and

(b) the whole or a part of the amount remains unpaid after the time by which the amount is due to be paid;

the entity is liable to pay general interest charge on the unpaid amount.

(2) An entity that is liable under this section to pay general interest charge on an unpaid amount is liable to pay the charge for each day in the period that:

(a) started at the beginning of the day on which the unpaid amount was due to be paid; and

(b) finishes at the end of the last day at the end of which any of the following remains unpaid:
  (i) the unpaid amount;
  (ii) general interest charge on any of the unpaid amount.

## 11 Joint and several liability for overpayment debts

(1) This section applies if the Commissioner is satisfied that:
  (a) an entity is liable under subsection 9(2) to repay an amount because of an overpayment of a Coronavirus economic response payment; and
  (b) the overpayment occurred because the entity reasonably relied on a statement that was made by another entity in the approved form; and
  (c) the statement by the other entity was false or misleading in a material particular, whether because of things in it or omitted from it; and
  (d) the other entity did not take reasonable care in connection with making the statement; and
  (e) the other entity directly benefitted from the entity being paid the Coronavirus economic response payment; and
  (f) it is reasonable for the entity and the other entity to be jointly and severally liable to pay the amount and any general interest charge payable on the amount under section 10.

(2) This section also applies if the Commissioner is satisfied that:
  (a) an entity is liable under subsection 9(2) to repay an amount because of an overpayment of a Coronavirus economic response payment; and
  (b) the overpayment is due to fraud of another entity (whether or not the entity was also involved in that fraud); and
  (c) it is reasonable for the entity and the other entity to be jointly and severally liable to pay the amount and any general interest charge payable on the amount under section 10.

(3) Despite sections 9 and 10, the entity and the other entity are jointly and severally liable to pay the amount and any general interest charge payable on the amount under section 10.

## 12 When the Commissioner is taken to have made a decision or given a notice

(1) The rules may provide for:
  (a) circumstances in which a decision is taken to have been made by the Commissioner under this Act; and
  (b) when the decision is taken to have been made.

(2) The rules may provide for:
  (a) circumstances in which a notice of a decision made by the Commissioner under this Act is taken to have been given to an entity; and
  (b) when the notice is taken to have been given to the entity.

(3) If:
  (a) a decision relating to an entity is made by the Commissioner under this Act; and
  (b) the rules do not require the Commissioner to give a notice of the decision to the entity; and
  (c) rules are not made for the purposes of subsection (2) in relation to the decision; and
  (d) Part IVC of the *Taxation Administration Act 1953* applies to the decision;

then, for the purposes of that Part, the Commissioner is taken to have given a notice of the decision to the entity on the day the decision was made.

(4) Subsection (3) applies even if the Commissioner in fact gives the entity a notice of the decision on a different day.

## 13 Review of the Commissioner's decision

(1) An entity who is dissatisfied with a decision covered by subsection (2) may object against the decision in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

(2) This subsection covers the following decisions of the Commissioner under this Act:

(a) a decision that the entity is not entitled to a Coronavirus economic response payment for a period;

(b) a decision that the entity is entitled to a Coronavirus economic response payment for a period of a particular amount;

(c) a decision not to make a determination under subsection 9(4) (about liability of the entity for an overpayment);

(d) a decision under subsection 11(1) or (2) that the entity is jointly and severally liable for an amount;

(e) a decision under subsection 11(1) or (2) that another entity is not jointly and severally liable for an amount;

(f) a decision not to make a determination under subsection 14(3) (about exempting the entity from the record keeping requirements).

## 14 No entitlement to payment unless record keeping requirements are met

*No entitlement if non- compliance with requirements*

(1) An entity is not entitled, and is taken never to have been entitled, to a Coronavirus economic response payment in respect of a period unless the entity has complied with:

(a) the pre-payment record keeping requirements set out in section 15 that apply to the payment for the period; and

(b) the post-payment record keeping requirements set out in section 16 that apply to the payment for the period.

*Exemption from requirements*

(2) However, subsection (1) does not apply to an entity in relation to the payment in respect of the period if a determination under subsection (3) provides that the requirements in section 15 and 16 do not apply to the payment in respect of the period.

(3) The Commissioner may make a written determination that an entity is not required to comply with the record keeping requirements set out in sections 15 and 16 in relation to a specified Coronavirus economic response payment in respect of a period. The determination may take effect from a time before the determination is made.

(4) A determination under subsection (3) is not a legislative instrument.

*Undertakings as to compliance*

(5) If an entity gives the Commissioner a statement in the approved form to the effect that the entity undertakes to comply with the record keeping requirements set out in sections 15 and 16, then the Commissioner may assume that the entity will comply with those requirements for the purposes of making a decision under this Act about entitlement to, or the amount of, the payment.

(6) However, if:

(a) the Commissioner makes a decision under this Act that the entity is entitled to the payment; and

(b) the entity does not comply with the requirements referred to in subsection (5);

then:

(c) the Commissioner may revoke the decision; and

(d) if the Commissioner revokes the decision under paragraph (c)—the entity is not entitled, and is taken never to have been entitled, to the payment.

## 15 Pre-payment record keeping requirements

*Scope of this section*

(1) This section sets out the pre-payment record keeping requirements that apply to an entity in relation to a Coronavirus economic response payment in respect of a period.

*Records to be kept*

(2) The entity must keep records that enable the entity to substantiate any information that the entity provided to the Commissioner in relation to the payment before the entity was paid the payment.

Note: Section 16 provides that the entity must continue to retain those records for 5 years after the entity is paid the payment.

(3) The records must be:

(a) in English; or

(b) readily accessible, and easily convertible into English.

*When entity is taken to have met the record keeping requirements*

(4) The entity is taken to have met the requirement set out in subsection (2) if the entity keeps records of a kind, and in a manner, specified in a written determination made by the Commissioner under subsection (5).

Note: Sections 8L, 8Q and 8T of the *Taxation Administration Act 1953* deal with keeping records incorrectly.

(5) For the purposes of subsection (4), the Commissioner may, by legislative instrument, specify:

(a) the kinds of records that an entity must keep for the purposes of that subsection; and

(b) the manner in which those records must be kept.

## 16 Post-payment record keeping requirements

*Scope of this section*

(1) This section sets out the post-payment record keeping requirements that apply to an entity in relation to a Coronavirus economic response payment in respect of a period.

*Records to be kept*

(2) If the rules require the entity to keep records that substantiate any information that the entity provides to the Commissioner in relation to the payment after the entity was paid the payment, then the entity must keep those records.

(3) The records must be:
  (a) in English; or
  (b) readily accessible, and easily convertible into English.

*When entity is taken to have met the record keeping requirements*

(4) The entity is taken to have met the requirement set out in subsection (2) if the entity keeps records of a kind, and in a manner, specified in a written determination made by the Commissioner under subsection (5).

Note: Sections 8L, 8Q and 8T of the *Taxation Administration Act 1953* deal with keeping records incorrectly.

(5) For the purposes of subsection (4), the Commissioner may, by legislative instrument, specify:
  (a) the kinds of records that an entity must keep for the purposes of that subsection; and
  (b) the manner in which those records must be kept.

*Period for retaining records*

(6) The entity must retain the records for the period of 5 years after the payment was paid.

(7) The entity must continue to retain, for the period of 5 years after the payment was made, the records that the pre-payment record keeping requirements set out in section 15 required the entity to retain.

(8) Despite subsections (6) and (7), it is not necessary for the entity to continue to retain records if the Commissioner notifies the entity that it does not need to retain them.

## 17 Commissioner may require records to be produced

(1) If the Commissioner gives the entity a written notice telling the entity to produce records that subsection 16(6) or (7) requires the entity to retain, then the entity must comply with the notice.

(2) A notice under subsection (1) must give the entity 28 days or more to comply, starting on the day after the notice is given. The Commissioner may allow the entity more time to comply with the notice.

(3) Despite section 8C of the *Taxation Administration Act 1953*, the entity does not commit an offence merely by not complying with a notice under subsection (1) of this section.

Note: Sections 8L, 8Q and 8T of the *Taxation Administration Act 1953* deal with keeping records incorrectly.

## 18 Records that are lost or destroyed

(1) This section applies to an entity if:

(a) section 15 or 16 requires the entity to retain a particular record; and

(b) the record is lost or destroyed.

(2) If the entity has a complete copy of the record that is lost or destroyed, it is treated as the original from the time of the loss or destruction.

(3) If the entity does not have such a copy, but the Commissioner is satisfied that the entity took reasonable precautions to prevent the loss or destruction, the entity's entitlement to a Coronavirus

economic response payment is not affected by the entity's failure to retain or produce the original record.

(4) This section has effect despite anything in section 14, 15, 16 or 17.

## 19 Contrived schemes

(1) If the Commissioner is satisfied that:

(a) one or more entities (a ***participant***) entered into or carried out a scheme (within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999*); and

(b) it would be concluded (having regard to the matters in subsection (3)) that any of the participants entered into or carried out the scheme, or any part of the scheme, for the sole or dominant purpose of achieving either of the following:

(i) making an entity (the ***recipient***) entitled to a Coronavirus economic response payment in respect of a period;

(ii) increasing the amount of the Coronavirus economic response payment to which an entity (also the ***recipient***) is entitled for the period;

(whether or not any of the participants is the recipient and whether or not any of them carried out the scheme or any part of the scheme); and

(c) the scheme or part of the scheme has achieved, or apart from this section would achieve, that purpose;

then the Commissioner may determine that this Act has, and is taken always to have had, effect as if:

(d) the recipient never became entitled to the payment; or

(e) the amount of the payment was always the amount specified by the Commissioner in the determination.

(2) A determination under subsection (1) has effect accordingly.

(3) For the purposes of subsection (1), the matters are as follows:

(a) the manner in which the scheme was entered into or carried out;

(b) the form and substance of the scheme;

(c) the time at which the scheme was entered into and the length of the period during which the scheme was carried out;

(d) the result in relation to the operation of this Act that, but for this section, would be achieved by the scheme;

(e) any change in the financial position of the recipient that has resulted, will result, or may reasonably be expected to result, from the scheme;

(f) any change in the financial position of any entity that has, or has had, any connection (whether of a business, family or other nature) with the recipient, being a change that has resulted, will result or may reasonably be expected to result, from the scheme;

(g) any other consequence for the recipient, or for any person referred to in paragraph (f), of the scheme having been entered into or carried out;

(h) the nature of any connection (whether of a business, family or other nature) between the recipient and any person referred to in paragraph (f).

(4) This section applies whether or not the scheme has been or is entered into or carried out in Australia or outside Australia, or partly in Australia and partly outside Australia.

(5) A determination under subsection (1) is not a legislative instrument.

## 20 Rules

*Power to make rules*

(1) The Treasurer may, by legislative instrument, make rules prescribing matters:

(a) required or permitted by this Act to be prescribed by the rules; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) To avoid doubt, the rules may not do the following:

(a) create an offence or civil penalty;
(b) provide powers of:
(i) arrest or detention; or
(ii) entry, search or seizure;
(c) impose a tax;
(d) set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
(e) directly amend the text of this Act.

*Rules may make different provision*

(3) Without limiting subsection 33(3A) of the *Acts Interpretation Act 1901*, the rules may make different provision in relation to:
(a) different kinds of entities; or
(b) different kinds of payments.

*Rules may subdelegate to the Commissioner*

(4) The rules may make provision in relation to a matter by conferring a power on the Commissioner to make:
(a) an instrument of a legislative or administrative character; or
(b) a decision of an administrative character.

*Rules may incorporate matters in other instruments*

(5) Despite subsection 14(2) of the *Legislation Act 2003*, the rules may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time.

*Rules may prescribe matters for the purposes of other laws*

(6) The rules may prescribe matters that are required or permitted by another law of the Commonwealth to be prescribed by the rules.

*Rules not limited because certain topics dealt with in this Act*

(7) Sections 8 to 11 and 13 to 19 do not limit the rules that may be made.

---

[*Minister's second reading speech made in—*
*House of Representatives on 8 April 2020*
*Senate on 8 April 2020*]

(53/20)

# Coronavirus Economic Response Package (Payments and Benefits) Rules 2020

made under subsection 20(1) of the

*Coronavirus Economic Response Package (Payments and Benefits) Act 2020*

## Compilation No. 3

| | |
|---|---|
| **Compilation date:** | 22 May 2020 |
| **Includes amendments up to:** | F2020L00605 |
| **Registered:** | 9 June 2020 |

**This compilation includes a commenced amendment made by F2020L00603**

Prepared by the Office of Parliamentary Counsel, Canberra

# About this compilation

### This compilation

This is a compilation of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* that shows the text of the law as amended and in force on 22 May 2020 (the ***compilation date***).

The notes at the end of this compilation (the ***endnotes***) include information about amending laws and the amendment history of provisions of the compiled law.

### Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. Any uncommenced amendments affecting the law are accessible on the Legislation Register (www.legislation.gov.au). The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. For more information on any uncommenced amendments, see the series page on the Legislation Register for the compiled law.

### Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

### Editorial changes

For more information about any editorial changes made in this compilation, see the endnotes.

### Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. For more information on any modifications, see the series page on the Legislation Register for the compiled law.

### Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

# Contents

# Part 1—Preliminary

## 1 Name

This instrument is the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*.

## 2 Commencement

(1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

**Commencement information**

| Column 1 | Column 2 | Column 3 |
|---|---|---|
| **Provisions** | **Commencement** | **Date/Details** |
| 1. The whole of this instrument | Immediately after this instrument is registered. | 9 April 2020 |

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

(2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

## 3 Authority

This instrument is made under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020.*

## 4 Definitions

(1) In this instrument:

***ACNC-registered charity*** has the meaning given by the GST Act.

***Act*** means the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020.*

***Australian workers' compensation law*** means a law of the Commonwealth, a State or a Territory relating to workers' compensation.

***current GST turnover*** has a meaning affected by subsection 8(8).

***dad and partner pay*** has the same meaning as in the *Paid Parental Leave Act 2010*.

***decline in turnover test*** means the test set out in sections 8 and 8A.

***eligible business participant*** has the meaning given by section 12.

***eligible employee*** has the meaning given by section 9.

***eligible religious practitioner*** has the meaning given by section 12B.

***fortnight*** means a 14-day period beginning on a Monday.

***holder***, in relation to a visa, has the same meaning as in the *Migration Act 1958*.

***jobkeeper fortnight*** has the meaning given by subsection 6(5).

***jobkeeper payment*** means a jobkeeper payment payable to an entity under section 14.

Note: The amount of the jobkeeper payment is $1,500: see section 13.

***jobkeeper scheme*** means the scheme relating to the jobkeeper payment set out in Part 2.

***listed Australian shares*** means shares in a listed public company, if the shares are listed for quotation in the official list of a stock exchange that is listed under the heading "Australia" in regulations made under the *Income Tax Assessment Act 1997* for the purposes of the definition of ***approved stock exchange*** in that Act.

***long term casual employee*** has the meaning given by subsection 9(5).

***non-profit body*** has the same meaning as in section 23-15 of the GST Act.

Note: The term ***non-profit body*** is not defined in the GST Act. However, this definition ensures that the meaning of the term in this instrument does not diverge from the meaning of the term in section 23-15 of that Act.

***parental leave pay*** has the same meaning as in the *Paid Parental Leave Act 2010*.

***PPL period*** has the same meaning as in the *Paid Parental Leave Act 2010*.

***projected GST turnover*** has the meaning given by the GST Act (as affected by subsection 8(8) of this instrument).

***registered religious institution*** means an institution that is:

(a) a registered charity; and

(b) registered under the *Australian Charities and Not-for-profits Commission Act 2012* as the subtype of entity mentioned in column 2 of item 4 of the table in subsection 25-5(5) of that Act.

***relevant comparison period*** has the meaning given by subsection 8(7).

***relevant employee*** has the meaning given by section 10A.

***religious practitioner*** means:

(a) a minister of religion; or

(b) a full-time member of a religious order.

***school*** has the meaning given by the GST Act.

***specified percentage***, for an entity, has the meaning given by subsection 8(2).

***Table A provider*** has the same meaning as in the *Higher Education Support Act 2003*.

***Table B provider*** has the same meaning as in the *Higher Education Support Act 2003*.

***turnover test period*** has the meaning given by subsection 8(7).

(2) Subject to subsection (1), an expression used in this instrument that is defined in the *Income Tax Assessment Act 1997* has the same meaning in this instrument as it has in that Act.

# Part 2—Jobkeeper payment

## Division 1—Simplified outline

### 5 Simplified outline

The jobkeeper payment is intended to assist businesses affected by the Coronavirus to cover the costs of wages of their employees.

The jobkeeper scheme starts on 30 March 2020 and ends on 27 September 2020.

A business that has suffered a substantial decline in turnover can be entitled to a jobkeeper payment of $1,500 per fortnight for each eligible employee. It is a condition of entitlement that the business has paid salary and wages of at least that amount to the employee in the fortnight.

A business that has suffered a substantial decline in turnover can also be entitled to a jobkeeper payment of $1,500 per fortnight for one business participant who is actively engaged in operating the business.

A registered religious institution that has suffered a substantial decline in turnover can also be entitled to a jobkeeper payment of $1,500 per fortnight for each eligible religious practitioner who is active as a member of the institution.

The jobkeeper scheme is administered by the Commissioner of Taxation.

The Commissioner pays the jobkeeper payment to entities shortly after the end of each calendar month, for fortnights ending in that month.

Some of the administrative arrangements for the scheme are set out in the Act.

## Division 2—Entitlement based on paid employees

### 6 Employer's entitlement to jobkeeper payment for an employee

(1) An entity (the ***employer***) is entitled to a jobkeeper payment for an individual for a fortnight if:

(a) the fortnight is a jobkeeper fortnight (see subsection (5)); and

(b) the employer qualifies for the jobkeeper scheme at or before the end of the fortnight (see section 7); and

(c) the individual is an eligible employee of the employer for the fortnight (see section 9); and

(d) the employer has satisfied the wage condition in section 10 in respect of the individual for the fortnight; and

(e) the employer has notified the Commissioner in the approved form at or before the time referred to in subsection (2) that the employer elects to participate in the jobkeeper scheme; and

(f) the employer has given information about the entitlement for the fortnight, including details of the individual, to the Commissioner in the approved form; and

(g) the employer has not notified the Commissioner in the approved form that the employer no longer wishes to participate in the jobkeeper scheme.

Note 1: Some provisions of the Act also affect whether an entity is entitled to a jobkeeper payment: see section 14 of the Act (about record keeping) and section 19 of the Act (about contrived schemes).

Note 2: The approved form may require further information: see paragraph 388-50(1)(c) in Schedule 1 to the *Taxation Administration Act 1953*.

(2) For the purposes of paragraph (1)(e), the time at or before which the employer must notify the Commissioner that the employer elects to participate in the jobkeeper scheme is:

(a) for an entitlement arising in the first or second jobkeeper fortnight—the end of the second jobkeeper fortnight; or

(b) for an entitlement arising in any other fortnight—the end of the fortnight.

Note 1: The Commissioner may defer the time for giving an approved form: see section 388-55 in Schedule 1 to the *Taxation Administration Act 1953*.

Note 2: See section 10A of this instrument for requirements that apply if an employer notifies the Commissioner that the employer elects to participate in the jobkeeper scheme.

*No other entity to be entitled for the same individual*

(3) An entity cannot be entitled under this section to a jobkeeper payment for an individual if another entity is entitled under this section or section 11 or 12A to a jobkeeper payment for the individual.

*Employer must notify individual*

(4) An employer must notify an individual in writing within 7 days of giving the Commissioner details of the individual under paragraph (1)(f).

*Meaning of **jobkeeper fortnight***

(5) Each of the following is a ***jobkeeper fortnight***:
  (a) the fortnight beginning on 30 March 2020;
  (b) each subsequent fortnight, ending with the fortnight ending on 27 September 2020.

## 7 When an entity qualifies for the jobkeeper scheme

(1) For the purposes of paragraphs 6(1)(b), 11(1)(c) and 12A(1)(c), an entity qualifies for the jobkeeper scheme at a time if:
  (a) on 1 March 2020, the entity:
    (i) carried on a business in Australia; or
    (ii) was a non-profit body that pursued its objectives principally in Australia; or
    (iii) was a deductible gift recipient that was, or operated, a public fund covered by item 9.1.1 or 9.1.2 of the table in subsection 30-80(1) of the *Income Tax Assessment Act 1997* (international affairs deductible gift recipients); and
  (b) the entity has satisfied the decline in turnover test at or before the time (see sections 8 and 8A).

Note: Qualifying entities must report monthly turnover information to the Commissioner for the duration of the scheme: see section 16.

*Exceptions*

(2) However, an entity does *not* qualify for the jobkeeper scheme at a time if:
  (a) an amount of levy under the *Major Bank Levy Act 2017* was imposed for any quarter ending before 1 March 2020 on:
    (i) the entity; or
    (ii) if the entity is a member of a consolidated group—another member of the group; or
  (b) the entity is an Australian government agency; or
  (c) the entity is a local governing body; or
  (d) the entity is wholly owned by an entity covered by paragraph (b) or (c); or
  (e) the entity is a sovereign entity, or would be a sovereign entity if subparagraphs 880-15(c)(ii) and (iii) of the *Income Tax Assessment Act 1997* were disregarded; or
  (f) if the entity is a company—a liquidator or provisional liquidator has been appointed in relation to the company; or
  (g) if the entity is an individual—a trustee in bankruptcy has been appointed to the individual's property.

## 8 Decline in turnover test

*Basic test*

(1) An entity satisfies the decline in turnover test at a time (the ***test time***) if:

(a) the entity's projected GST turnover for a turnover test period in which the test time occurs falls short of the entity's current GST turnover for a relevant comparison period (the ***comparison turnover***); and

(b) the shortfall, expressed as a percentage of the comparison turnover, equals or exceeds the specified percentage for the entity (see subsection (2)).

Note 1: See subsection (7) for the meanings of ***turnover test period*** and ***relevant comparison period***.

Note 2: Current GST turnover and projected GST turnover are modified for the purposes of this section and section 8A: see subsection (8).

Note 3: For provisions about contrived schemes, see section 19 of the Act.

Example: Patrick Enterprises assesses its eligibility for jobkeeper payments on 6 April 2020 based on a projected GST turnover for April 2020 of $6 million. It considers that the comparable period is the month of April 2019 for which it had a current GST turnover of $10 million. The April 2020 turnover falls short of the April 2019 turnover by $4 million, which is 40% of the April 2019 turnover. This exceeds the specified percentage, so the decline in turnover test is satisfied.

(2) The ***specified percentage*** for an entity is:

(a) if the lower threshold applies to the entity (see subsection (3))—15%; or

(b) if the higher threshold applies to the entity (see subsection (4))—50%; or

(c) otherwise—30%.

(3) For the purposes of paragraph (2)(a), the lower threshold applies to an entity if the entity is an ACNC-registered charity other than:

(a) an entity that is a Table A provider or a Table B provider; or

(b) a school.

Note: Paragraph (b) affects only non-government schools, as government schools do not qualify for the jobkeeper scheme because of paragraphs 7(2)(b) to (d).

(4) For the purposes of paragraph (2)(b), the higher threshold applies to an entity if:

(a) the lower threshold does not apply to the entity (see subsection (3)); and

(b) either:

(i) the entity's aggregated turnover for the income year in which the test time referred to in subsection (1) occurs is likely to exceed $1 billion; or

(ii) the entity's aggregated turnover for the previous income year exceeds $1 billion.

*Alternative test determined by Commissioner*

(5) An entity also satisfies the decline in turnover test if:

(a) an alternative decline in turnover test determined by the Commissioner under subsection (6) applies to the entity; and

(b) the entity satisfies the alternative test.

(6) The Commissioner may, by legislative instrument, determine that an alternative decline in turnover test applies to a class of entities, if the Commissioner is satisfied that there is not an appropriate relevant comparison period for the purpose of an entity in the class of entities satisfying the decline in turnover test under subsection (1).

*Meaning of **turnover test period** and **relevant comparison period***

(7) For the purposes of this section and section 8A:
(a) unless paragraph (aa) applies—the ***turnover test period*** must be:
(i) a calendar month that ends after 30 March 2020 and before 1 October 2020; or
(ii) a quarter that starts on 1 April 2020 or 1 July 2020; and
(aa) if the entity is a Table A provider—the ***turnover test period*** must be a period of 6 months starting on 1 January 2020; and
(b) the ***relevant comparison period*** must be the period in 2019 that corresponds to the turnover test period.

*Modifications relating to GST turnover*

(8) In calculating an entity's current GST turnover, and projected GST turnover, for a period for the purposes of this section and sections 8A and 16 the following apply:
(a) sections 188-15 and 188-20 of the GST Act apply as if a reference to a month were a reference to the period;
(b) subsections 188-15(2) and 188-20(2) of that Act (about members of GST groups) are to be disregarded;
(c) for calculating current GST turnover:
(i) subsection 188-15(1) of that Act is to be applied at the end of the period; and
(ii) subsection 188-15(1) of that Act has effect as if the reference in that subsection to ", or are likely to make, during the 12 months ending at the end of that month," were instead a reference to "during that period";
(d) for calculating projected GST turnover—subsection 188-20(1) of that Act has effect as if the reference in that subsection to "during that month and the next 11 months" were instead a reference to "during that period";
(e) each external Territory is treated as forming part of the indirect tax zone (within the meaning of that Act);
(ea) for an entity that is a Table A provider or a Table B provider—subsection 9-17(3) of the GST Act is to be disregarded in its application to a payment covered by an appropriation under the *Higher Education Support Act 2003* or the *Australian Research Council Act 2001*;
(f) for an entity that is a deductible gift recipient—each gift described in an applicable item of the table in section 30-15 of the *Income Tax Assessment*

*Act 1997* and received, or likely to be received, by the entity in the period (other than from an associate) results in the following treatment:

(i) the entity is treated as making, or as likely to make (as the case requires), a supply in the period for consideration;

(ii) the value (within the meaning of the GST Act) of the supply is treated as being equal to the amount of the gift (if the gift is money) or the market value of the gift (if the gift is not money);

(g) for an entity that is an ACNC-registered charity (other than a deductible gift recipient)—each gift received, or likely to be received, by the entity in the period (other than from an associate) also results in the treatment set out in paragraph (f) if the gift is:

(i) a gift of money; or

(ii) a gift of property with a market value of more than $5,000; or

(iii) a gift of listed Australian shares;

(h) for an entity that is an ACNC-registered charity (other than a Table A provider, a Table B provider, or a school)—a supply made by the entity is to be disregarded, if:

(i) the consideration for the supply is provided by an Australian government agency, a local governing body, the United Nations, or an agency of the United Nations; and

(ii) the ACNC-registered charity elects, in accordance with subsection (9), for this paragraph to apply.

(9) The election referred to in subparagraph (8)(h)(ii) must be:

(a) in the approved form; and

(b) given to the Commissioner within 7 days of notifying the Commissioner of the entity's election to participate in the jobkeeper scheme (see paragraph 6(1)(e) and 12A(1)(f)), or such later time as the Commissioner allows.

The election cannot be revoked.

## 8A Decline in turnover test—modified test for certain group structures

(1) This section applies, in addition to section 8, to an entity (an ***employer entity***) if:

(a) the employer entity is a member of a consolidated group, consolidatable group, or a GST group; and

(b) the employer entity's principal activity is supplying other members of the group with services (***employee labour services***) consisting of the performance of work by individuals the employer entity employs; and

(c) the Commissioner has not made a determination under subsection (5) in relation to the employer entity.

*Modified test*

(2) The employer entity satisfies the decline in turnover test at a time (the ***test time***) if:

(a) in a turnover test period in which the test time occurs, the employer entity:

(i) supplies employee labour services to one or more members of the group (each of which is a ***test member***) that have as their principal activity the making of supplies to entities other than members of the group; and

(ii) does not supply employee labour services to entities that are not members of the group (disregarding supplies that are merely incidental to the principal activity of the employer entity); and

(b) the employer entity would satisfy the decline in turnover test in subsection 8(1) at the test time if the modifications in subsection (3) of this section were made.

Note 1: An entity that satisfies the decline in turnover test under this subsection may be entitled to a jobkeeper payment under this Division or Division 3.

Note 2: See subsection 8(7) for the meaning of ***turnover test period***.

(3) For the purposes of paragraph (2)(b), the modifications are that, in applying subsection 8(1):

(a) instead of the employer entity's projected GST turnover for the turnover test period, the sum of the projected GST turnovers for that period of each test member is to be used; and

(b) instead of the employer entity's current GST turnover for a relevant comparison period, the sum of the current GST turnovers for that period of each test member is to be used.

Note 1: See subsection 8(7) for the meaning of ***relevant comparison period***.

Note 2: Current GST turnover and projected GST turnover are modified for the purposes of this section: see subsection 8(8).

(4) However, if:

(a) an alternative decline in turnover test determined by the Commissioner under subsection 8(6) applies to a test member; and

(b) the alternative test involves applying subsection 8(1) to the test member for the turnover test period, but using a different amount instead of the test member's current GST turnover for a relevant comparison period;

then in applying paragraph (3)(b) of this section, that different amount is to be used instead of the test member's current GST turnover for the period.

*Determination that section does not apply*

(5) The Commissioner may determine in writing that this section does not apply to an entity if the Commissioner is satisfied, having regard to the purpose of the jobkeeper scheme and any other matter the Commissioner considers to be relevant, of either or both of the following:

(a) that the test in this section is unsuitable, in the circumstances of the group, for measuring the extent to which employees within the group are performing work in operations that have suffered a relevant decline in turnover;

(b) that the application of this section to the entity might, in the circumstances of the group (including the group's history of compliance with its

obligations under taxation laws), risk the integrity of the Commissioner's administration of the jobkeeper scheme.

*Membership of more than one group*

(6) To avoid doubt, if an entity is a member of one or more of the following:
  (a) a consolidated group;
  (b) a consolidatable group;
  (c) a GST group;
it satisfies the decline in turnover test in subsection (2) if it satisfies that test in relation to its membership of any of those groups.

## 9 Meaning of *eligible employee*

(1) An individual is an ***eligible employee*** of an entity for a fortnight if:
  (a) the individual is employed by the entity at any time in the fortnight; and
  (b) the individual satisfies the requirements in subsections (2) and (3); and
  (c) the individual is not excluded from being an eligible employee of the entity for the fortnight under subsection (4).

*1 March 2020 requirements*

(2) The requirements are that, on 1 March 2020:
  (a) the individual was aged 16 years or over; and
  (aa) if the individual was aged 16 or 17 years—the individual was:
    (i) independent within the meaning of section 1067A of the *Social Security Act 1991*; or
    (ii) not undertaking full-time study (within the meaning of the *Social Security Act 1991*); and
  (b) the individual was:
    (i) an employee (other than a casual employee) of the entity; or
    (ii) a long term casual employee of the entity; and
  (c) the individual:
    (i) was an Australian resident (within the meaning of section 7 of the *Social Security Act 1991*); or
    (ii) was a resident of Australia for the purposes of the *Income Tax Assessment Act 1936* and was the holder of a special category visa referred to in the regulations under the *Migration Act 1958* as a Subclass 444 (Special Category) visa.

Note: See subsection (5) for the meaning of ***long term casual employee***.

*Nomination requirements*

(3) The requirements are that:
  (a) the individual has given to the entity a notice (the ***nomination notice***) in the approved form stating that:

(i) the individual satisfies the requirements in subsection (2) and in paragraph (b) of this subsection in relation to the entity; and

(ii) the individual agrees to be nominated by the entity as an eligible employee of the entity for the purposes of the jobkeeper scheme; and

(aa) if the individual was aged 16 or 17 years on 1 March 2020—the nomination notice includes:

(i) a statement that the individual was independent within the meaning of section 1067A of the *Social Security Act 1991* on 1 March 2020; or

(ii) a statement that the individual was not undertaking full-time study (within the meaning of the *Social Security Act 1991*) on 1 March 2020; and

(b) at the time the individual gives the entity the nomination notice:

(i) the individual is not excluded under subsection (4) from being an eligible employee of the entity for the fortnight in which the time occurs; and

(ii) if the individual is a long term casual employee of the entity—the individual is not also an employee (other than a casual employee) of another entity; and

(iii) the individual has not given any other entity, or the Commissioner, a nomination notice under this subsection or subsection 12(4) or 12B(4).

Note: If an overpayment results from an individual nominating with more than one entity, the individual may be jointly and severally liable to pay the overpayment and any general interest charge on the overpayment: see section 11 of the Act.

*Exclusions*

(4) An individual is excluded from being an eligible employee of an entity for a fortnight if:

(a) parental leave pay is payable to the individual and the individual's PPL period overlaps with, or includes, the fortnight; or

(b) at any time during the fortnight, the individual is paid dad and partner pay; or

(c) all of the following apply:

(i) the individual is totally incapacitated for work throughout the fortnight;

(ii) an amount is payable to the individual under, or in accordance with, an Australian workers' compensation law in respect of the individual's total incapacity for work;

(iii) the amount is payable in respect of a period that overlaps with, or includes, the fortnight.

*Meaning of **long term casual employee***

(5) An individual is a ***long term casual employee*** of an entity at a time if:

(a) at that time, the individual was a casual employee of the entity; and

(b) the individual had been employed by the entity on a regular and systematic basis during the period of 12 months that ended at that time.

*Businesses that change hands etc.*

(6) For the purposes of this section, treat an entity (the ***later entity***) that employs an individual at a time (the ***later time***) as having also employed the individual at an earlier time if:

(a) the individual was employed at the earlier time by another entity in the same wholly-owned group as the later entity; or

(b) both of the following apply:

(i) at the later time, the individual is employed in a business carried on by the later entity or in a non-profit body the purposes of which are carried on by the later entity;

(ii) at the earlier time, the individual was employed in the same business or non-profit body, but that business was, or the purposes of that non-profit body were, carried on by a different entity.

Note 1: Paragraph (b) means that an individual can be an eligible employee of an entity even if the business or non-profit body in which the individual is employed changes hands after 1 March 2020.

Note 2: Paragraph (b) also means that, in working out if an individual is a long term casual employee of an entity at a time, employment in a business or non-profit body during the period of 12 months that ended at that time can be counted even if the business or non-profit body changed hands during that period.

## 10 Wage condition

(1) For the purposes of paragraph 6(1)(d), an employer satisfies the wage condition in respect of an individual for a fortnight if the sum of the amounts covered by subsection (2) equals or exceeds $1,500.

(2) The amounts covered by this subsection are:

(a) amounts paid by the employer to the individual in the fortnight by way of salary, wages, commission, bonus or allowances; and

(b) amounts withheld by the employer from payments made to the individual in the fortnight under section 12-35 in Schedule 1 to the *Taxation Administration Act 1953*; and

(c) contributions made by the employer in the fortnight to a superannuation fund or an RSA for the benefit of the individual, if the contributions are made under a salary sacrifice arrangement (within the meaning of the *Superannuation Guarantee (Administration) Act 1992*); and

(d) other amounts that, in the fortnight, are applied or dealt with in any way if the individual agreed:

(i) for the amount to be so applied or dealt with; and

(ii) in return, for amounts covered by paragraph (a) for the individual for the fortnight to be reduced (including to nil).

(3) If there is a regular period for which the employer would usually pay employees in relation to the performance of work by the employees, and that period is

longer than a fortnight, then in applying this section those payments are to be allocated to a fortnight or fortnights in a reasonable manner.

(4) For the purposes of this section, the Commissioner may treat a particular event that happened in a fortnight as having happened in a different fortnight or fortnights, if, or to the extent that, it is reasonable to do so in the Commissioner's opinion.

## 10A Requirement to give employees notice of election to participate

(1) If, for the purposes of paragraph 6(1)(e), an entity notifies the Commissioner that the entity elects to participate in the jobkeeper scheme, the entity must give notice, in writing, of the entity's election to each individual who is a relevant employee of the entity.

Note: This section does not apply to an entity in respect of an election to participate in the jobkeeper scheme that the entity makes for the purposes of paragraph 11(1)(e) or 12A(1)(f).

(2) The notice must:
(a) be given within 7 days of the entity notifying the Commissioner of the entity's election to participate, or such later time as the Commissioner allows; and
(b) state that the individual must give the entity a nomination notice referred to in paragraph 9(3)(a) if the individual agrees to be nominated by the entity as an eligible employee of the entity; and
(c) include information about the steps the individual can take to give the entity the nomination notice.

Note: Refusal or failure to give a notice to an individual as required by this section is an offence under section 8C of the *Taxation Administration Act 1953*.

(3) An individual is a ***relevant employee*** of an entity if the individual is an employee of the entity on the day the entity notifies the Commissioner of the entity's election to participate.

(4) However, an individual is not a ***relevant employee*** of an entity if the entity reasonably believes that the individual does not satisfy the requirements in subsection 9(2).

Note: The requirements in subsection 9(2) are the requirements that an individual must have satisfied on 1 March 2020 to be an eligible employee of an entity.

(5) An individual is also not a ***relevant employee*** of an entity if:
(a) the entity is an ACNC-registered charity; and
(b) the entity has made an election under paragraph 8(8)(h); and
(c) it is reasonable to conclude that amounts covered by subsection 10(2) in respect of the individual for the fortnight in which the election is made are fully funded by consideration of the kind referred to in subparagraph 8(8)(h)(i) (about consideration provided by an Australian government agency, a local governing body, the United Nations, or an agency of the United Nations).

## Division 3—Entitlement based on business participation

### 11 Entity's entitlement to jobkeeper payment for a business participant

(1) An entity is entitled to a jobkeeper payment for an individual for a fortnight if:

(a) the fortnight is a jobkeeper fortnight (see subsection 6(5)); and

(b) the entity is not a non-profit body; and

(c) the entity qualifies for the jobkeeper scheme at or before the end of the fortnight (see section 7); and

(d) the individual is the eligible business participant for the entity for the fortnight (see section 12); and

(e) the entity has notified the Commissioner in the approved form at or before the time referred to in subsection (2) that the entity elects to participate in the jobkeeper scheme; and

(f) the entity has given information about the entitlement for the fortnight, including details of the individual, to the Commissioner in the approved form; and

(g) the entity has not notified the Commissioner in the approved form that the entity no longer wishes to participate in the jobkeeper scheme.

Note 1: Some provisions of the Act also affect whether an entity is entitled to a jobkeeper payment: see section 14 of the Act (about record keeping) and section 19 of the Act (about contrived schemes).

Note 2: The approved form may require further information: see paragraph 388-50(1)(c) in Schedule 1 to the *Taxation Administration Act 1953*.

(2) For the purposes of paragraph (1)(e), the time at or before which the entity must notify the Commissioner that the entity elects to participate in the jobkeeper scheme is:

(a) for an entitlement arising in the first or second jobkeeper fortnight—the end of the second jobkeeper fortnight; or

(b) for an entitlement arising in another fortnight—the end of the fortnight.

Note: The Commissioner may defer the time for giving an approved form: see section 388-55 in Schedule 1 to the *Taxation Administration Act 1953*.

*Only one eligible business participant per entity*

(3) An entity cannot be entitled under this section to a jobkeeper payment for more than one individual (whether for the same fortnight or a different fortnight).

*No other entity to be entitled for the same individual*

(4) An entity cannot be entitled under this section to a jobkeeper payment for an individual if another entity is entitled under this section or section 6 or 12A to a jobkeeper payment for the individual.

*Entity must notify individual*

(5) Unless the entity is a sole trader, the entity must notify an individual in writing within 7 days of giving the Commissioner details of the individual under paragraph (1)(f).

Note: In the case of a sole trader, the entity and the individual are the same: see item 1 of the table in subsection 12(2).

*Integrity rule*

(6) An entity is *not* entitled to a jobkeeper payment under this section unless the entity had an ABN on 12 March 2020 (or a later time allowed by the Commissioner), and the requirement in subsection (7) or (8) is satisfied.

(7) For the purposes of subsection (6), the requirement in this subsection is satisfied if:
  (a) an amount was included in the entity's assessable income for the 2018-19 income year in relation to it carrying on a business; and
  (b) the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the amount should be so included.

(8) For the purposes of subsection (6), the requirement in this subsection is satisfied if:
  (a) the entity made a taxable supply in a tax period that applied to it that:
    (i) started on or after 1 July 2018; and
    (ii) ended before 12 March 2020; and
  (b) the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the entity had made the taxable supply.

(9) For the purposes of subsection (8), in determining whether the entity made a supply (within the meaning of the GST Act) that is a taxable supply:
  (a) assume that the entity is registered (within the meaning of that Act); and
  (b) assume that the supply is neither GST-free (within the meaning of that Act) nor input taxed (within the meaning of that Act); and
  (c) for an entity carrying on business solely in the external Territories—assume that the external Territories are part of the indirect tax zone (within the meaning of that Act).

## 12 Meaning of *eligible business participant*

(1) An individual is the ***eligible business participant*** for an entity for a fortnight if:
  (a) the individual is *not* employed by the entity at any time in the fortnight; and
  (b) the individual satisfies the requirements in subsection (2) at a time in the fortnight; and
  (c) the individual satisfies the requirements in subsections (3) and (4); and
  (d) the individual is not excluded from being the eligible business participant for the entity for the fortnight under subsection (6).

*Business participation requirements*

(2) The requirements are satisfied at a time if, at that time:
  (a) the individual is actively engaged in the business carried on by the entity; and
  (b) the individual is covered by column 2 of the applicable item of the following table.

| Item | Column 1<br>If the entity is a … | Column 2<br>The individual must be … |
|---|---|---|
| 1 | Sole trader | The entity |
| 2 | Partnership | A partner in the partnership |
| 3 | Trust | An adult beneficiary of the trust |
| 4 | Company | A shareholder in or a director of the company |

*1 March 2020 requirements*

(3) The requirements are that, on 1 March 2020:
  (a) the individual was aged 16 years or over; and
  (aa) if the individual was aged 16 or 17 years—the individual was:
    (i) independent within the meaning of section 1067A of the *Social Security Act 1991*; or
    (ii) not undertaking full-time study (within the meaning of the *Social Security Act 1991*); and
  (b) the individual satisfied the requirements in subsection (2); and
  (c) the individual:
    (i) was an Australian resident (within the meaning of section 7 of the *Social Security Act 1991*); or
    (ii) was a resident of Australia for the purposes of the *Income Tax Assessment Act 1936* and was the holder of a special category visa referred to in the regulations under the *Migration Act 1958* as a Subclass 444 (Special Category) visa.

*Nomination requirements*

(4) The requirements are that:
  (a) the individual has given a notice (the ***nomination notice***) in the manner set out in subsection (5) stating that:
    (i) the individual satisfies the requirements in subsection (3) and in paragraph (b) of this subsection in relation to the entity; and
    (ii) the individual agrees to be nominated by the entity as the eligible business participant for the entity for the purposes of the jobkeeper scheme; and
  (aa) if the individual was aged 16 or 17 years on 1 March 2020—the nomination notice includes:

(i) a statement that the individual was independent within the meaning of section 1067A of the *Social Security Act 1991* on 1 March 2020; or

(ii) a statement that the individual was not undertaking full-time study (within the meaning of the *Social Security Act 1991*) on 1 March 2020; and

(b) at the time the individual gives the entity the nomination notice:

(i) the individual satisfies the requirements in subsection (2) in relation to the entity; and

(ii) the individual is not an employee (other than a casual employee) of another entity; and

(iii) the individual has not given any other entity, or the Commissioner, a nomination notice under this subsection or subsection 9(3) or 12B(4); and

(iv) the individual is not excluded under subsection (6) from being the eligible business participant for the entity for the fortnight in which the time occurs; and

(c) at the time the individual gives the entity the nomination notice, no other individual has already satisfied the requirements in this subsection in relation to the entity.

Note: If an overpayment results from an individual nominating with more than one entity, the individual may be jointly and severally liable to pay the overpayment and any general interest charge on the overpayment: see section 11 of the Act.

(5) For the purposes of subsection (4), the notice must be given, in the approved form, to:

(a) unless paragraph (b) applies—the entity; or

(b) if the individual is a sole trader—the Commissioner.

*Exclusions*

(6) An individual is excluded from being the eligible business participant for an entity for a fortnight if:

(a) parental leave pay is payable to the individual and the individual's PPL period overlaps with, or includes, the fortnight; or

(b) at any time during the fortnight, the individual is paid dad and partner pay; or

(c) all of the following apply:

(i) the individual is totally incapacitated for work throughout the fortnight;

(ii) an amount is payable to the individual under, or in accordance with, an Australian workers' compensation law in respect of the individual's total incapacity for work;

(iii) the amount is payable in respect of a period that overlaps with, or includes, the fortnight.

# Division 3A—Entitlement based on paid religious practitioners

## 12A Entity's entitlement to jobkeeper payment for a religious practitioner

(1) An entity is entitled to a jobkeeper payment for an individual for a fortnight if:

(a) the fortnight is a jobkeeper fortnight (see subsection 6(5)); and

(b) the entity is a registered religious institution; and

(c) the entity qualifies for the jobkeeper scheme at or before the end of the fortnight (see section 7); and

(d) the individual is an eligible religious practitioner for the entity for the fortnight (see section 12B); and

(e) the entity has satisfied the payment condition in section 12C in respect of the individual for the fortnight; and

(f) the entity has notified the Commissioner in the approved form at or before the time referred to in subsection (2) that the entity elects to participate in the jobkeeper scheme; and

(g) the entity has given information about the entitlement for the fortnight, including details of the individual, to the Commissioner in the approved form; and

(h) the entity has not notified the Commissioner in the approved form that the entity no longer wishes to participate in the jobkeeper scheme.

Note 1: Some provisions of the Act also affect whether an entity is entitled to a jobkeeper payment: see section 14 of the Act (about record keeping) and section 19 of the Act (about contrived schemes).

Note 2: The approved form may require further information: see paragraph 388-50(1)(c) in Schedule 1 to the *Taxation Administration Act 1953*.

(2) For the purposes of paragraph (1)(f), the time at or before which the entity must notify the Commissioner that the entity elects to participate in the jobkeeper scheme is:

(a) for an entitlement arising in the first, second or third jobkeeper fortnight—the end of the third jobkeeper fortnight; or

(b) for an entitlement arising in another fortnight—the end of the fortnight.

Note: The Commissioner may defer the time for giving an approved form: see section 388-55 in Schedule 1 to the *Taxation Administration Act 1953*.

*No other entity to be entitled for the same individual*

(3) An entity cannot be entitled under this section to a jobkeeper payment for an individual if another entity is entitled under this section or section 6 or 11 to a jobkeeper payment for the individual.

*Entity must notify individual*

(4) The entity must notify an individual in writing within 7 days of giving the Commissioner details of the individual under paragraph (1)(g).

*Integrity rule*

(5) An entity is *not* entitled to a jobkeeper payment under this section unless the entity was a registered religious institution on 12 March 2020.

## 12B Meaning of *eligible religious practitioner*

(1) An individual is an ***eligible religious practitioner*** for an entity that is a registered religious institution for a fortnight if:
  (a) the individual is *not* employed by the institution at any time in the fortnight; and
  (b) the individual satisfies the requirements in subsection (2) at a time in the fortnight; and
  (c) the individual satisfies the requirements in subsections (3) and (4); and
  (d) the individual is not excluded from being an eligible religious practitioner for the institution for the fortnight under subsection (5).

*Fortnightly requirements*

(2) The requirements are satisfied at a time if, at that time:
  (a) the individual is a religious practitioner; and
  (b) the individual is doing an activity, or a series of activities:
    (i) in pursuit of the individual's vocation as a religious practitioner; and
    (ii) as a member of the registered religious institution.

*1 March 2020 requirements*

(3) The requirements are that, on 1 March 2020:
  (a) the individual was aged 16 years or over; and
  (b) if the individual was aged 16 or 17 years—the individual was:
    (i) independent within the meaning of section 1067A of the *Social Security Act 1991*; or
    (ii) not undertaking full-time study (within the meaning of the *Social Security Act 1991*); and
  (c) the individual satisfied the requirements in subsection (2); and
  (d) the individual:
    (i) was an Australian resident (within the meaning of section 7 of the *Social Security Act 1991*); or
    (ii) was a resident of Australia for the purposes of the *Income Tax Assessment Act 1936* and was the holder of a special category visa referred to in the regulations under the *Migration Act 1958* as a Subclass 444 (Special Category) visa.

*Nomination requirements*

(4) The requirements are that:
  (a) the individual has given to the entity a notice (the ***nomination notice***) in the approved form stating that:

(i) the individual satisfies the requirements in subsection (3) and in paragraph (b) of this subsection in relation to the entity; and

(ii) the individual agrees to be nominated by the entity as an eligible religious practitioner for the entity for the purposes of the jobkeeper scheme; and

(b) at the time the individual gives the entity the nomination notice:

(i) the individual satisfies the requirements in subsection (2) in relation to the entity for the fortnight in which the time occurs; and

(ii) the individual is not an employee (other than a casual employee) of another entity; and

(iii) the individual is not excluded under subsection (5) from being an eligible religious practitioner for the entity for the fortnight in which the time occurs; and

(iv) the individual has not given any other entity, or the Commissioner, a nomination notice under this subsection or subsection 9(3) or 12(4).

Note: If an overpayment results from an individual nominating with more than one entity, the individual may be jointly and severally liable to pay the overpayment and any general interest charge on the overpayment: see section 11 of the Act.

*Exclusions*

(5) An individual is excluded from being an eligible religious practitioner for an entity for a fortnight if:

(a) parental leave pay is payable to the individual and the individual's PPL period overlaps with, or includes, the fortnight; or

(b) at any time during the fortnight, the individual is paid dad and partner pay; or

(c) all of the following apply:

(i) the individual is totally incapacitated for work throughout the fortnight;

(ii) an amount is payable to the individual under, or in accordance with, an Australian workers' compensation law in respect of the individual's total incapacity for work;

(iii) the amount is payable in respect of a period that overlaps with, or includes, the fortnight.

## 12C Payment condition

(1) For the purposes of paragraph 12A(1)(e), an entity satisfies the payment condition in respect of an individual for a fortnight if:

(a) in the fortnight, the entity makes one or more payments to the individual from which an amount must be withheld under section 12-47 in Schedule 1 to the *Taxation Administration Act 1953*; or

(b) in the fortnight, the entity provides either or both of the following to the individual:

(i) a fringe benefit (within the meaning of the *Fringe Benefits Tax Assessment Act 1986*);

(ii) a benefit (within the meaning of the *Fringe Benefits Tax Assessment Act 1986*) that is an exempt benefit for the purposes of that Act.

(2) If there is a regular period for which the entity would usually pay religious practitioners, and that period is longer than a fortnight, then in applying this section those payments are to be allocated to a fortnight or fortnights in a reasonable manner.

(3) For the purposes of this section, the Commissioner may treat a particular event that happened in a fortnight as having happened in a different fortnight or fortnights, if, or to the extent that, it is reasonable to do so in the Commissioner's opinion.

## Division 4—Payment

### 13 Amount of the jobkeeper payment for a fortnight

The amount of an entity's jobkeeper payment for an individual for a fortnight is $1,500.

### 14 Payment of jobkeeper payment

(1) If the Commissioner is satisfied that an entity is entitled under section 6, 11 or 12A to a jobkeeper payment for a fortnight, the Commissioner must pay the entity the jobkeeper payment in accordance with this Division and the Act.

(2) The Commissioner may, for the purposes of determining whether the Commissioner is satisfied under subsection (1) in relation to an entity, accept, either in whole or in part, a statement in the approved form lodged with the Commissioner by the entity under this Part.

*Transitional rule for first 2 jobkeeper fortnights*

(3) The Commissioner may pay an entity a jobkeeper payment for a fortnight in accordance with this Division and the Act without being satisfied that the entity is entitled under section 6 or section 11 to the jobkeeper payment if:

(a) the fortnight is the first or second jobkeeper fortnight; and

(b) the entity has notified the Commissioner in the approved form that the entity elects to participate in the jobkeeper scheme (as referred to in paragraph 6(1)(e) or 11(1)(e)); and

(c) the Commissioner is satisfied, on the basis of information provided in the approved form, that it is reasonable in the circumstances to pay the jobkeeper payment.

*Overpayment*

(4) To avoid doubt, the fact that the Commissioner pays an entity a jobkeeper payment under this section does not mean the entity is entitled under section 6, 11 or 12A to the jobkeeper payment.

Note: If the entity was in fact not entitled to a jobkeeper payment paid under this section, the provisions about overpayments would apply: see sections 9, 10 and 11 of the Act.

### 15 When the Commissioner must pay jobkeeper payments

The Commissioner must pay the jobkeeper payment no later than the later of:

(a) 14 days after the end of the calendar month in which the fortnight ends; and

(b) 14 days after the requirements in section 14 for the Commissioner to make the payment are met.

Note: For the method of paying the payment, see section 8 of the Act.

# Division 5—Administration

## 16 Reporting requirement relating to qualification

(1) An entity that has qualified for the jobkeeper scheme (see section 7) at a time must notify the Commissioner in the approved form of the matters set out in subsection (2) or (3) within 7 days of the end of a calendar month (the ***reporting month***) if the entity is entitled to a jobkeeper payment for a fortnight that ends in the month.

(2) Unless subsection (3) applies, the matters are:
  (a) the entity's current GST turnover for the reporting month; and
  (b) the entity's projected GST turnover for the following month.

Note: Current GST turnover and projected GST turnover are modified for the purposes of this section: see subsection 8(8).

(3) If the entity relied on subsection 8A(2) (modified decline in turnover test for certain group structures) to qualify for the jobkeeper scheme, the matters are:
  (a) the sum of the current GST turnovers for the reporting month of each test member of the group referred to in subparagraph 8A(2)(a)(i); and
  (b) the sum of the projected GST turnovers for the following month of each of those members.

Note: Current GST turnover and projected GST turnover are modified for the purposes of this section: see subsection 8(8).

## 17 When payment constitutes notice

(1) Subsection (2) applies if:
  (a) an entity has notified the Commissioner in the approved form that the entity elects to participate in the jobkeeper scheme (as referred to in paragraph 6(1)(e), 11(1)(e) or 12A(1)(f)); and
  (b) the entity has given the Commissioner, in the approved form, details of one or more individuals for fortnights ending in a calendar month (as referred to in paragraph 6(1)(f), 11(1)(f) or 12A(1)(g)); and
  (c) the Commissioner has paid jobkeeper payments to the entity for those fortnights; and
  (d) the sum of the amounts paid by the Commissioner is consistent with the Commissioner being satisfied that the entity is entitled to a jobkeeper payment for each individual covered by paragraph (b) of this subsection for each of the fortnights referred to in that paragraph.

(2) The Commissioner is taken to have given the entity notice, on the day the last jobkeeper payment covered by paragraph (1)(c) of this section is paid, that the Commissioner is satisfied the entity is entitled to a jobkeeper payment for each individual covered by paragraph (1)(b) of this section for each of the fortnights referred to in paragraph (1)(b).

(3) However, this section does not apply in relation to the calendar month in which the first 2 jobkeeper fortnights end.

## 18 Notice of decision on entitlement

(1) This section applies if:

(a) an entity has notified the Commissioner in the approved form that the entity elects to participate in the jobkeeper scheme (as referred to in paragraph 6(1)(e), 11(1)(e) or 12A(1)(f)); and

(b) the entity has given the Commissioner, in the approved form, details of one or more individuals for fortnights ending in a calendar month (as referred to in paragraph 6(1)(f), 11(1)(f) or 12A(1)(g)); and

(c) the sum of the amounts paid by the Commissioner (including nil) is *not* consistent with the Commissioner being satisfied that the entity is entitled to a jobkeeper payment for each individual covered by paragraph (b) of this subsection for each of the fortnights referred to in that paragraph.

(2) The Commissioner must give the entity notice in writing of a decision covered by subsection (3) as soon as practicable after making the decision.

Note: The Act provides for a review of certain decisions: see section 13 of the Act.

(3) This subsection covers a decision of the Commissioner under section 14 that the entity:

(a) is entitled to a jobkeeper payment for an individual for a fortnight; or

(b) is not entitled to a jobkeeper payment for an individual for a fortnight.

(4) The Commissioner may combine in one notice given under subsection (2) decisions made in relation to more than one individual.

## 18A Confirmation of giving of information—notice to ADI

(1) This section applies if an ADI has notified the Commissioner in the approved form of information relating to an entity's entitlement to jobkeeper payments for one or more fortnights.

(2) The Commissioner must give the ADI a notice in writing stating that, in the Commissioner's opinion, the information:

(a) satisfies the requirement in subsection (3); or

(b) does not satisfy that requirement.

(3) For the purposes of subsection (2), the information satisfies the requirement in this subsection if it is comprised of any of the following:

(a) information that the entity gave to the Commissioner;

(b) information that the Commissioner gave to the entity.

(4) The Commissioner must give the notice under subsection (2) within a reasonable time after receiving the notification from the ADI.

## 19 Time limit for jobkeeper scheme

Despite anything in this Part:

(a) the Commissioner must not pay an amount by way of a jobkeeper payment after 30 September 2021; and

(b) if:

(i) an entity is entitled to a jobkeeper payment for a fortnight (disregarding this paragraph); and

(ii) the Commissioner would contravene paragraph (a) by paying that jobkeeper payment;

the entity is not entitled to the jobkeeper payment for the fortnight.

## 20 Later legislation may limit jobkeeper scheme

An entitlement to jobkeeper payment under this Part may be cancelled, revoked, terminated, varied or made subject to conditions by or under later legislation.

# Part 10—Application, saving and transitional provisions

## Division 1—Application and transitional provisions relating to the Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 2) 2020

### 100 Definitions

In this Division:

***amending instrument*** means the *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 2) 2020*.

***commencement time*** means the time when the amending instrument commences.

### 101 Application

Subject to sections 102 and 103, the amendments made by Parts 1 and 2 of Schedule 1 to the amending instrument apply in relation to jobkeeper fortnights beginning on or after 30 March 2020.

### 102 Application—individuals aged 16 or 17 years on 1 March 2020

The amendments of sections 9 and 12 made by items 11, 12, 14 and 15 of Schedule 1 to the amending instrument apply in relation to jobkeeper fortnights beginning at or after the commencement time.

### 103 Application—nomination requirements for business participants

The amendment of subsection 12(4) made by item 37 of Schedule 1 to the amending instrument applies in relation to nomination notices given at or after the commencement time.

### 104 Transitional—time required for election

If an entity notifies the Commissioner that the entity elects to participate in the jobkeeper scheme before the commencement time, paragraph 8(9)(b) applies to the entity as if a reference in that paragraph to "within 7 days of notifying the Commissioner of the entity's election to participate in the jobkeeper scheme" were instead a reference to "within 7 days of the commencement of this subsection".

### 105 Transitional—requirement to give employees notice of election to participate

(1) If an entity notifies the Commissioner that the entity elects to participate in the jobkeeper scheme before the commencement time, paragraph 10A(2)(a) applies

to the entity as if a reference in that paragraph to "within 7 days of the entity notifying the Commissioner of the entity's election to participate" were instead a reference to "no later than 7 days after the commencement of this section".

(2) An entity is not required to give a notice to an individual under section 10A if the entity reasonably believes that, on 1 March 2020:

(a) the individual was aged 16 or 17 years; and

(b) the individual was:

(i) undertaking full-time study (within the meaning of the *Social Security Act 1991*); and

(ii) not independent within the meaning of section 1067A of that Act.

## Division 2—Application provisions relating to the Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 3) 2020

### 106 Definitions

In this Division:

***amending instrument*** means the *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 3) 2020*.

### 107 Application

The amendments made by Schedule 1 to the amending instrument apply in relation to jobkeeper fortnights beginning on or after 30 March 2020.

# Endnotes

## Endnote 1—About the endnotes

The endnotes provide information about this compilation and the compiled law.

The following endnotes are included in every compilation:

Endnote 1—About the endnotes
Endnote 2—Abbreviation key
Endnote 3—Legislation history
Endnote 4—Amendment history

**Abbreviation key—Endnote 2**
The abbreviation key sets out abbreviations that may be used in the endnotes.

**Legislation history and amendment history—Endnotes 3 and 4**
Amending laws are annotated in the legislation history and amendment history.

The legislation history in endnote 3 provides information about each law that has amended (or will amend) the compiled law. The information includes commencement details for amending laws and details of any application, saving or transitional provisions that are not included in this compilation.

The amendment history in endnote 4 provides information about amendments at the provision (generally section or equivalent) level. It also includes information about any provision of the compiled law that has been repealed in accordance with a provision of the law.

**Editorial changes**
The *Legislation Act 2003* authorises First Parliamentary Counsel to make editorial and presentational changes to a compiled law in preparing a compilation of the law for registration. The changes must not change the effect of the law. Editorial changes take effect from the compilation registration date.

If the compilation includes editorial changes, the endnotes include a brief outline of the changes in general terms. Full details of any changes can be obtained from the Office of Parliamentary Counsel.

**Misdescribed amendments**
A misdescribed amendment is an amendment that does not accurately describe the amendment to be made. If, despite the misdescription, the amendment can be given effect as intended, the amendment is incorporated into the compiled law and the abbreviation "(md)" added to the details of the amendment included in the amendment history.

If a misdescribed amendment cannot be given effect as intended, the abbreviation "(md not incorp)" is added to the details of the amendment included in the amendment history.

## Endnote 2—Abbreviation key

ad = added or inserted

am = amended

amdt = amendment

c = clause(s)

C[x] = Compilation No. x

Ch = Chapter(s)

def = definition(s)

Dict = Dictionary

disallowed = disallowed by Parliament

Div = Division(s)

ed = editorial change

exp = expires/expired or ceases/ceased to have effect

F = Federal Register of Legislation

gaz = gazette

LA = *Legislation Act 2003*

LIA = *Legislative Instruments Act 2003*

(md) = misdescribed amendment can be given effect

(md not incorp) = misdescribed amendment cannot be given effect

mod = modified/modification

No. = Number(s)

o = order(s)

Ord = Ordinance

orig = original

par = paragraph(s)/subparagraph(s) /sub-subparagraph(s)

pres = present

prev = previous

(prev…) = previously

Pt = Part(s)

r = regulation(s)/rule(s)

reloc = relocated

renum = renumbered

rep = repealed

rs = repealed and substituted

s = section(s)/subsection(s)

Sch = Schedule(s)

Sdiv = Subdivision(s)

SLI = Select Legislative Instrument

SR = Statutory Rules

Sub-Ch = Sub-Chapter(s)

SubPt = Subpart(s)

underlining = whole or part not commenced or to be commenced

## Endnote 3—Legislation history

| Name | Registration | Commencement | Application, saving and transitional provisions |
|---|---|---|---|
| Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 | 9 Apr 2020 (F2020L00419) | 9 Apr 2020 (s 2(1) item 1) | |
| Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 1) 2020 | 24 Apr 2020 (F2020L00479) | 24 Apr 2020 (s 2(1) item 1) | — |
| Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 2) 2020 | 1 May 2020 (F2020L00546) | 1 May 2020 (s 2(1) item 1) | — |
| Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 4) 2020 | 22 May 2020 (F2020L00603) | 22 May 2020 (s 2(1) item 1) | — |
| Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 3) 2020 | 22 May 2020 (F2020L00605) | 22 May 2020 (s 2(1) item 1) | — |

# Endnote 4—Amendment history

| Provision affected | How affected |
|---|---|
| **Part 1** | |
| s 2 | rep LA s 48D |
| s 4 | am F2020L00546 |
| **Part 2** | |
| **Division 1** | |
| s 5 | am F2020L00546 |
| **Division 2** | |
| s 6 | am F2020L00546 |
| s 7 | am F2020L00546 |
| s 8 | am F2020L00546; F2020L00605 |
| s 8A | ad F2020L00546 |
| s 9 | am F2020L00546 |
| s 10A | ad F2020L00546 |
| **Division 3** | |
| s 11 | am F2020L00546 |
| s 12 | am F2020L00546 |
| **Division 3A** | |
| Division 3A | ad F2020L00546 |
| s 12A | ad F2020L00546 |
| s 12B | ad F2020L00546 |
| s 12C | ad F2020L00546 |
| **Division 4** | |
| s 14 | am F2020L00546 |
| **Part 2** | |
| **Division 5** | |
| s 16 | am F2020L00546 |
| s 17 | am F2020L00546 |
| s 18 | am F2020L00546 |
| s 18A | ad F2020L00479 |
| | am F2020L00603 |
| **Part 10** | |
| Part 10 | ad F2020L00546 |
| **Division 1** | |
| s 100 | ad F2020L00546 |
| s 101 | ad F2020L00546 |
| s 102 | ad F2020L00546 |
| s 103 | ad F2020L00546 |

## Endnote 4—Amendment history

| Provision affected | How affected |
|---|---|
| s 104 | ad F2020L00546 |
| s 105 | ad F2020L00546 |
| **Division 2** | |
| s 106 | ad F2020L00605 |
| s 107 | ad F2020L00605 |

# Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020

# No. 38, 2020

## An Act to provide an economic response, and deal with other matters, relating to the coronavirus, and for other purposes

Note: An electronic version of this Act is available on the Federal Register of Legislation (https://www.legislation.gov.au/)

# Contents

# Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020

**No. 38, 2020**

## An Act to provide an economic response, and deal with other matters, relating to the coronavirus, and for other purposes

[*Assented to 9 April 2020*]

The Parliament of Australia enacts:

## 1 Short title

This Act is the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020*.

## 2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

**Commencement information**

| Column 1 | Column 2 | Column 3 |
|---|---|---|
| **Provisions** | **Commencement** | **Date/Details** |
| 1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table | The day this Act receives the Royal Assent. | 9 April 2020 |
| 2. Schedule 1, Part 1 | The day this Act receives the Royal Assent. | 9 April 2020 |
| 3. Schedule 1, Part 2 | 28 September 2020. | 28 September 2020 |
| 4. Schedule 2, Parts 1 to 3 | At the same time as section 3 of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* commences. | 9 April 2020 |
| 5. Schedule 2, item 27 | Immediately after the commencement of Schedule 11 to the *Coronavirus Economic Response Package Omnibus Act 2020*. | 25 March 2020 |
| 6. Schedule 2, item 28 | The day this Act receives the Royal Assent. | 9 April 2020 |
| 7. Schedule 3 | The day this Act receives the Royal Assent. | 9 April 2020 |
| 8. Schedule 4, Part 1 | The first day on the first CSS fortnight (within the meaning of the *A New Tax System (Family Assistance) Act 1999*) that begins after this Act receives the Royal Assent. | 20 April 2020 |

| Commencement information | | |
|---|---|---|
| **Column 1** | **Column 2** | **Column 3** |
| **Provisions** | **Commencement** | **Date/Details** |
| 9. Schedule 4, Part 2 | The day this Act receives the Royal Assent. | 9 April 2020 |
| 10. Schedule 4, Part 3 | 1 July 2020. | 1 July 2020 |
| 11. Schedule 5 | The day this Act receives the Royal Assent. | 9 April 2020 |
| 12. Schedule 6 | The day this Act receives the Royal Assent. | 9 April 2020 |
| 13. Schedule 7, Part 1 | The day this Act receives the Royal Assent. | 9 April 2020 |
| 14. Schedule 7, Part 2 | 1 July 2023. | 1 July 2023 |

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

## 3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

# Schedule 1—Amendment of the Fair Work Act 2009

## Part 1—Amendments

### *Fair Work Act 2009*

#### 1 Subsection 539(2) (at the end of the table)

Add:

| | | | | |
|---|---|---|---|---|
| **Part 6-4C—Coronavirus economic response** | | | | |
| 39 | 789GD | (a) an employee;<br>(b) an employee organisation;<br>(c) an inspector | (a) the Federal Court;<br>(b) the Federal Circuit Court;<br>(c) an eligible State or Territory court | for a serious contravention—600 penalty units; or<br>otherwise—60 penalty units |
| 40 | 789GDA(2)<br>789GDB(2)<br>789GDB(3)<br>789GU<br>789GW | (a) an employee;<br>(b) an employee organisation;<br>(c) an inspector | (a) the Federal Court;<br>(b) the Federal Circuit Court;<br>(c) an eligible State or Territory court | 60 penalty units |
| 41 | 789GXA | (a) an employee;<br>(b) an employee organisation;<br>(c) an inspector | (a) the Federal Court;<br>(b) the Federal Circuit Court;<br>(c) an eligible State or Territory court | 600 penalty units |

#### 2 At the end of subsection 576(1)

Add:

; (r) Coronavirus economic response (Part 6-4C).

#### 3 After paragraph 675(2)(j)

Insert:

; (k) an order under Part 6-4C (which deals with the Coronavirus economic response).

### 4 At the end of subsection 716(1)

Add:

; (g) a provision of Part 6-4C (which deals with the Coronavirus economic response);

(h) a jobkeeper enabling direction (within the meaning of Part 6-4C);

(i) a provision of an agreement authorised by Part 6-4C.

### 5 After Part 6-4B

Insert:

# Part 6-4C—Coronavirus economic response

## Division 1—Introduction

### 789GA Guide to this Part

The purpose of this Part is to assist employers who qualify for the jobkeeper scheme to deal with the economic impact of the Coronavirus known as COVID-19.

This Part authorises an employer who qualifies for the jobkeeper scheme to give a jobkeeper enabling stand down direction to an employee (including to reduce hours of work).

This Part authorises an employer who qualifies for the jobkeeper scheme to give a direction to an employee about:

(a) the duties to be performed by the employee; or

(b) the location of the employee's work.

This Part authorises an employer who qualifies for the jobkeeper scheme and an employee to make an agreement in relation to:

(a) the days or times when the employee is to perform work; or

(b) the employee taking annual leave, including at half pay.

This Part provides that an employer who qualifies for the jobkeeper scheme must consult an employee (or a representative of the employee) before giving a direction.

This Part provides that:

(a) a direction given by an employer who qualifies for the jobkeeper scheme to an employee does not apply to the employee if the direction is unreasonable in all of the circumstances; and

(b) a direction given by an employer who qualifies for the jobkeeper scheme to an employee in relation to the duties to be performed by the employee, or the location of the employee's work, does not apply to the employee unless the employer reasonably believes the direction is necessary to continue the employment of one or more employees of the employer.

This Part provides for other safeguards relating to directions given by employers who qualify for the jobkeeper scheme, including a rule that this Part will at all times operate subject to listed laws.

This Part provides that the FWC may deal with a dispute about the operation of this Part.

Note: The core provisions of this Part (namely, Divisions 2, 3, 4, 5, 6, 9 and 11) will be repealed on 28 September 2020.

## 789GB Object

The object of this Part is to:

(a) make temporary changes to assist the Australian people to keep their jobs, and maintain their connection to their employers, during the unprecedented economic downturn and work restrictions arising from:

(i) the COVID-19 pandemic; and

(ii) government initiatives to slow the transmission of COVID-19; and

(b) help sustain the viability of Australian businesses during the COVID-19 pandemic, including by preparing the Australian economy to recover with speed and strength after a period of hibernation; and

(c) continue the employment of employees; and

(d) ensure the continued effective operation of occupational health and safety laws during the COVID-19 pandemic; and

(e) help ensure that, where reasonably possible, employees:

(i) remain productively employed during the COVID-19 pandemic; and

(ii) continue to contribute to the business of their employer where it is safe and possible for the business to continue operating.

### 789GC Definitions

In this Part:

***designated employment provision*** means:

(a) a provision of this Act (other than a provision of this Part or a provision mentioned in section 789GZ); or

(b) a provision of:

(i) a fair work instrument; or

(ii) a contract of employment; or

(iii) a transitional instrument (within the meaning of item 2 of Schedule 3 to the Transitional Act).

***employee*** means a national system employee.

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

***employer*** means a national system employer.

***fortnight*** means a 14-day period beginning on a Monday.

***hourly rate of pay guarantee*** has the meaning given by section 789GDB.

***jobkeeper enabling direction*** means a direction authorised by section 789GDC, 789GE or 789GF.

***jobkeeper payment*** means a payment that:

(a) is payable by the Commonwealth in accordance with the jobkeeper payment rules; and

(b) is known as jobkeeper payment.

***jobkeeper payment rules*** means rules made under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*.

***licence*** includes:

(a) registration; and

(b) permit.

***minimum payment guarantee*** has the meaning given by section 789GDA.

***qualifies for the jobkeeper scheme*** has the same meaning as in the jobkeeper payment rules.

***wage condition*** means the wage condition set out in the jobkeeper payment rules.

## Division 2—Employer payment obligations

### 789GD Obligation of employer to satisfy the wage condition

If:

(a) an employer qualifies for the jobkeeper scheme; and

(b) the employer would be entitled to jobkeeper payment for an employee for a fortnight if (among other things) the employer satisfied the wage condition in respect of the employee for the fortnight;

the employer must ensure that the wage condition has been satisfied in respect of the employee by the end of the fortnight.

Note: 1 This section is a civil remedy provision (see Part 4-1).

Note 2: Under the jobkeeper payment rules, a jobkeeper payment is a payment to an employer for a particular employee for a fortnight.

## 789GDA Minimum payment guarantee

(1) For the purposes of this Part, the ***minimum payment guarantee*** consists of the rule set out in subsection (2).

(2) If a jobkeeper payment is payable to an employer for an employee of the employer for a fortnight, the employer must ensure that the total amount payable to the employee in respect of the fortnight is not less than the greater of the following:

(a) the amount of jobkeeper payment payable to the employer for the employee for the fortnight;

(b) the amounts payable to the employee in relation to the performance of work during the fortnight.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Amounts referred to in this subsection (other than paragraph (a)) include the following, if they become payable in respect of the fortnight:

(a) incentive-based payments and bonuses;
(b) loadings;
(c) monetary allowances;
(d) overtime or penalty rates;
(e) leave payments.

## 789GDB Hourly rate of pay guarantee

(1) For the purposes of this Part, the ***hourly rate of pay guarantee*** consists of the rules set out in subsections (2) and (3).

*Minimum rate of pay—jobkeeper enabling stand down*

(2) If a jobkeeper enabling direction given by an employer under section 789GDC (jobkeeper enabling stand down) applies to an employee of the employer, the employer must ensure that the employee's base rate of pay (worked out on an hourly basis) is not less than the base rate of pay (worked out on an hourly basis) that would have been applicable to the employee if the direction had not been given to the employee.

Note: This subsection is a civil remedy provision (see Part 4-1).

*Minimum rate of pay—duties of work*

(3) If a jobkeeper enabling direction given by an employer under section 789GE (duties of work) applies to an employee of the employer, the employer must ensure that the employee's base rate of pay (worked out on an hourly basis) is not less than the greater of the following:

(a) the base rate of pay (worked out on an hourly basis) that would have been applicable to the employee if the direction had not been given to the employee;

(b) the base rate of pay (worked out on an hourly basis) that is applicable to the duties the employee is performing.

Note: This subsection is a civil remedy provision (see Part 4-1).

*Base rate of pay for certain payment arrangements*

(4) If:

(a) an employee is paid otherwise than:

(i) on an hourly basis; or

(ii) by reference to an hourly rate of pay; and

(b) a workplace instrument applicable to the employee:

(i) specifies the employee's base rate of pay for the purposes of the National Employment Standards; or

(ii) sets out a method for working out the employee's base rate of pay for the purposes of the National Employment Standards;

then, for the purposes of this section, the employee's base rate of pay is:

(c) the amount specified in the workplace instrument; or

(d) the amount worked out using the method set out in the workplace instrument;

as the case requires.

## Division 3—Jobkeeper enabling stand down

### 789GDC Jobkeeper enabling stand down

(1) If:

(a) after the commencement of this section, an employer of an employee gave the employee a direction (the ***jobkeeper enabling stand down direction***) to:

(i) not work on a day or days on which the employee would usually work; or

(ii) work for a lesser period than the period which the employee would ordinarily work on a particular day or days; or

(iii) work a reduced number of hours (compared with the employee's ordinary hours of work);

during a period (the ***jobkeeper enabling stand down period***); and

(b) when the jobkeeper enabling stand down direction was given, the employer qualified for the jobkeeper scheme; and

(c) the employee cannot be usefully employed for the employee's normal days or hours during the jobkeeper enabling stand down period because of changes to business attributable to:

(i) the COVID-19 pandemic; or

(ii) government initiatives to slow the transmission of COVID-19; and

(d) the implementation of the jobkeeper enabling stand down direction is safe, having regard to (without limitation) the nature and spread of COVID-19; and

(e) the employer becomes entitled to one or more jobkeeper payments for the employee:

(i) for a period that consists of or includes the jobkeeper enabling stand down period; or

(ii) for periods that, when considered together, consist of or include the jobkeeper enabling stand down period;

the jobkeeper enabling stand down direction is authorised by this section.

(2) If the jobkeeper enabling stand down direction applies to the employee, then, during the jobkeeper enabling stand down period, the employer is still required to comply with:

(a) section 789GD (which deals with satisfying the wage condition); and

(b) the minimum payment guarantee (see section 789GDA); and

(c) the hourly rate of pay guarantee (see section 789GDB);

but is not otherwise required to make payments to the employee in respect of the jobkeeper enabling stand down period.

(3) The jobkeeper enabling stand down direction does not apply to the employee during a period when the employee:

(a) is taking paid or unpaid leave that is authorised by the employer; or

(b) is otherwise authorised to be absent from the employee's employment.

Note: An employee may take paid or unpaid leave (for example, annual leave) during all or part of a period during which the jobkeeper enabling stand down direction would otherwise apply to the employee.

(4) For the purposes of subparagraph (1)(a)(iii), the reduced number of hours may be nil.

(5) This section has effect despite a designated employment provision.

## Division 4—Duties, location and days of work

### 789GE Duties of work

(1) If:

(a) after the commencement of this section, an employer of an employee directed the employee to perform any duties during a period (the ***relevant period***) that are within the employee's skill and competency; and

(b) when the direction was given, the employer qualified for the jobkeeper scheme; and

(c) those duties are safe, having regard to (without limitation) the nature and spread of COVID-19; and

(d) in a case where the employee was required to have a licence or qualification in order to perform those duties—the employee had the licence or qualification; and

(e) those duties are reasonably within the scope of the employer's business operations; and

(f) the employer becomes entitled to one or more jobkeeper payments for the employee:

(i) for a period that consists of or includes the relevant period; or

(ii) for periods that, when considered together, consist of or include the relevant period;

the direction is authorised by this section.

(2) This section has effect despite a designated employment provision.

### 789GF Location of work

(1) If:

(a) after the commencement of this section, an employer of an employee directed the employee to perform duties during a period (the ***relevant period***) at a place that is different from the employee's normal place of work, including the employee's home; and

(b) when the direction was given, the employer qualified for the jobkeeper scheme; and

(c) the place is suitable for the employee's duties; and

(d) if the place is not the employee's home—the place does not require the employee to travel a distance that is unreasonable in all the circumstances, including the circumstances surrounding the COVID-19 pandemic; and

(e) the performance of the employee's duties at the place is:

(i) safe, having regard to (without limitation) the nature and spread of COVID-19; and

(ii) reasonably within the scope of the employer's business operations; and

(f) the employer becomes entitled to one or more jobkeeper payments for the employee:

(i) for a period that consists of or includes the relevant period; or

(ii) for periods that, when considered together, consist of or include the relevant period;

the direction is authorised by this section.

(2) This section has effect despite a designated employment provision.

### 789GG Days of work etc.

(1) If:

(a) an employer of an employee qualifies for the jobkeeper scheme; and

(b) the employer is entitled to one or more jobkeeper payments for the employee; and

(c) the employer gives the employee a request to make an agreement with the employer under subsection (2);

the employee:

(d) must consider the request; and

(e) must not unreasonably refuse the request.

(2) If:

(a) after the commencement of this section, an employer and an employee of the employer agree in writing to the employee performing duties during a period (the ***relevant period***):

(i) on different days; or

(ii) at different times;

compared with the employee's ordinary days or times of work; and

(b) when the agreement was made, the employer qualified for the jobkeeper scheme; and

(c) the performance of the employee's duties on those days or at those times is:

(i) safe, having regard to (without limitation) the nature and spread of COVID-19; and

(ii) reasonably within the scope of the employer's business operations; and

(d) the agreement does not have the effect of reducing the employee's number of hours of work (compared with the employee's ordinary hours of work); and

(e) the employer becomes entitled to one or more jobkeeper payments for the employee:

(i) for a period that consists of or includes the relevant period; or

(ii) for periods that, when considered together, consist of or include the relevant period;

the agreement is authorised by this section.

(3) This section has effect despite a designated employment provision.

## Division 5—Taking paid annual leave

### 789GJ Taking paid annual leave

(1) If:

(a) the employer of an employee qualifies for the jobkeeper scheme; and

(b) the employer is entitled to one or more jobkeeper payments for the employee; and

(c) the employer gives the employee a request to take paid annual leave; and

(d) complying with the request will not result in the employee having a balance of paid annual leave of fewer than 2 weeks;

the employee:

(e) must consider the request; and

(f) must not unreasonably refuse the request.

(2) If:

(a) after the commencement of this section, an employer and an employee of the employer agree in writing to the employee taking twice as much paid annual leave, at half the employee's rate of pay, for a period (the ***relevant period***); and

(b) when the agreement was made, the employer qualified for the jobkeeper scheme; and

(c) the employer becomes entitled to one or more jobkeeper payments for the employee:

(i) for a period that consists of or includes the relevant period; or

(ii) for periods that, when considered together, consist of or include the relevant period;

the agreement is authorised by this section.

(3) This section has effect despite a designated employment provision.

## Division 6—Rules relating to jobkeeper enabling directions

### 789GK Reasonableness

A jobkeeper enabling direction given by an employer to an employee of the employer does not apply to the employee if the direction is unreasonable in all of the circumstances.

Note: A direction may be unreasonable depending on the impact of the direction on any caring responsibilities the employee may have.

### 789GL Continuing the employment of employees

(1) A jobkeeper enabling direction given by an employer to an employee of the employer under section 789GE (duties of work) or 789GF (location of work) has no effect unless the employer has information before the employer that leads the employer to reasonably believe that the direction is necessary to continue the employment of one or more employees of the employer.

(2) In determining whether a jobkeeper enabling direction given by an employer to an employee of the employer (the ***relevant employee***) is necessary to continue the employment of one or more employees of the employer, it is immaterial that a similar jobkeeper enabling direction could have been given by the employer to an employee of the employer other than the relevant employee.

### 789GM Consultation

(1) A jobkeeper enabling direction given by an employer to an employee of the employer does not apply to the employee unless:
  (a) the employer gave the employee written notice of the employer's intention to give the direction; and
  (b) the employer did so:
    (i) at least 3 days before the direction was given; or
    (ii) if the employee genuinely agreed to a lesser notice period—during that lesser notice period; and
  (c) before giving the direction, the employer consulted the employee (or a representative of the employee) about the direction.

(2) The regulations may require that a notice under paragraph (1)(a) must be in a prescribed form.

(3) Subsection (1) does not apply to a jobkeeper enabling direction (the ***relevant direction***) given by an employer to an employee of the employer under a particular section of this Part if:

(a) the employer previously complied with paragraphs (1)(a), (b) and (c) in relation to a proposal to give the employee another direction under that section; and

(b) in the course of consulting the employee (or a representative of the employee) about the proposal, the employee (or the representative of the employee) expressed views to the employer; and

(c) the employer considered those views in deciding to give the relevant direction.

(4) An employer must keep a written record of a consultation under paragraph (1)(c):

(a) with an employee of the employer; or

(b) with a representative of an employee of the employer.

### 789GN Form of direction

(1) A jobkeeper enabling direction must be in writing.

(2) The regulations may require that a jobkeeper enabling direction must be in a prescribed form.

### 789GP Duration

(1) A jobkeeper enabling direction given by an employer to an employee of the employer under a particular section of this Part continues in effect until:

(a) it is withdrawn or revoked by the employer; or

(b) it is replaced by a new jobkeeper enabling direction given by the employer to the employee under that section.

(2) Subsection (1) has effect subject to:

(a) subsection (3); and

(b) an order made by the FWC under Division 10.

(3) A jobkeeper enabling direction ceases to have effect at the start of 28 September 2020.

### 789GQ Compliance

If a jobkeeper enabling direction given by an employer applies to an employee of the employer, the employee must comply with the direction.

## Division 7—Service

### 789GR Service

(1) For the purposes of this Act, if an employee is subject to a jobkeeper enabling direction during a period, that period counts as service.

(2) Subsection (1) has effect in addition to section 22.

## Division 8—Accrual rules

### 789GS Accrual rules

(1) If a jobkeeper enabling direction under section 789GDC (jobkeeper enabling stand down) applies to an employee, the employee accrues leave entitlements as if the direction had not been given.

(2) If a jobkeeper enabling direction under section 789GDC (jobkeeper enabling stand down) applies to an employee, the following are to be calculated as if the direction had not been given:
  (a) redundancy pay;
  (b) payment in lieu of notice of termination.

(3) If an employee takes paid annual leave in accordance with an agreement under subsection 789GJ(2), the employee accrues leave entitlements as if the agreement had not been made.

(4) If an employee takes paid annual leave in accordance with an agreement under subsection 789GJ(2), the following are to be calculated as if the agreement had not been made:
  (a) redundancy pay;

(b) payment in lieu of notice of termination.

## Division 9—Employee requests for secondary employment, training etc.

### 789GU Employee requests for secondary employment, training etc.

If:

(a) a jobkeeper enabling direction given by an employer under section 789GDC (jobkeeper enabling stand down) applies to an employee of the employer; and

(b) the employee gives the employer any of the following requests:

(i) a request to engage in reasonable secondary employment;

(ii) a request for training;

(iii) a request for professional development;

the employer:

(c) must consider the request; and

(d) must not unreasonably refuse the request.

Note: This section is a civil remedy provision (see Part 4-1).

## Division 10—Dealing with disputes

### 789GV FWC may deal with a dispute about the operation of this Part

(1) The FWC may deal with a dispute about the operation of this Part.

(2) The FWC may deal with a dispute by arbitration.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

(3) The FWC may deal with a dispute only on application by any of the following:

(a) an employee;

(b) an employer;

(c) an employee organisation;
(d) an employer organisation.

(4) The FWC may make any of the following orders:
(a) an order that the FWC considers desirable to give effect to a jobkeeper enabling direction;
(b) an order setting aside a jobkeeper enabling direction;
(c) an order:
(i) setting aside a jobkeeper enabling direction; and
(ii) substituting a different jobkeeper enabling direction;
(d) any other order that the FWC considers appropriate.

(5) The FWC must not make an order under paragraph (4)(a) or (c) on or after 28 September 2020.

(6) An order made by the FWC under paragraph (4)(a) ceases to have effect at the start of 28 September 2020.

(7) In dealing with the dispute, the FWC must take into account fairness between the parties concerned.

### 789GW Contravening an FWC order dealing with a dispute about the operation of this Part

A person must not contravene a term of an FWC order dealing with a dispute about the operation of this Part.

Note: This section is a civil remedy provision (see Part 4-1).

## Division 11—Exclusions

### 789GX Exclusions

The Minister may, by legislative instrument, exclude one or more specified employers from the operation of any or all of the following provisions:
(a) section 789GDC;
(b) section 789GE;
(c) section 789GF;
(d) section 789GG;

(e) section 789GJ.

## Division 12—Protections

### 789GXA Misuse of jobkeeper enabling direction

An employer must not purport to give a jobkeeper enabling direction if:

(a) the direction is not authorised by this Part; and

(b) the employer knows that the direction is not authorised by this Part.

Note: This section is a civil remedy provision (see Part 4-1).

### 789GY Protection of workplace rights

For the avoidance of doubt, each of the following is a workplace right within the meaning of Part 3-1:

(a) the benefit that an employee of an employer has or derives because of an obligation of the employer under section 789GD to satisfy the wage condition;

(b) agreeing, or not agreeing, to perform duties:

(i) on different days; or

(ii) at different times;

in accordance with subsection 789GG(2);

(c) agreeing, or not agreeing, to take paid annual leave in compliance with a request under subsection 789GJ(1);

(d) agreeing, or not agreeing, to take paid annual leave in accordance with subsection 789GJ(2);

(e) making a request under section 789GU (secondary employment, training etc.).

### 789GZ Relationship with other laws etc.

(1) This Part will at all times operate subject to the following:

(a) Division 2 of Part 2-9 (payment of wages etc.);

(b) Part 3-1 (general protections);

(c) Part 3-2 (unfair dismissal);

(d) section 772 (employment not to be terminated on certain grounds);
(e) an anti-discrimination law;
(f) a law of the Commonwealth, a State or a Territory, so far as the law deals with health and safety obligations of employers or employees;
(g) a law of the Commonwealth, a State or a Territory, so far as the law deals with workers' compensation.

(2) This Part has effect subject to a person's right to be represented, or collectively represented, by an employee organisation or employer organisation.

### 789GZA Redundancy

The giving of a jobkeeper enabling direction does not amount to a redundancy.

## Division 13—Review of this Part

### 789GZB Review of this Part

(1) The Minister must cause an independent review to be conducted of the operation of this Part.

(2) The review must start on or before:
(a) 28 July 2020; or
(b) if a later day is specified in the regulations—that later day.

(3) The persons who conduct the review must:
(a) complete the review; and
(b) give the Minister a written report of the review;
on or before:
(c) 8 September 2020; or
(d) if a later day is specified in the regulations—that later day.

(4) The Minister must cause a copy of the report to be tabled in each House of the Parliament within 5 sitting days of that House after the report is given to the Minister.

# Part 2—Repeal of the core provisions of Part 6-4C of the Fair Work Act 2009 etc.

## *Fair Work Act 2009*

### 6 Subsection 539(2) (table items 39, 40 and 41)

Repeal the items (including the heading).

### 7 Sections 789GA and 789GB

Repeal the sections.

### 8 Section 789GC (definition of *jobkeeper enabling direction*)

Before "section", insert "repealed".

### 9 Divisions 2, 3, 4, 5, 6, 9 and 11 of Part 6-4C

Repeal the Divisions.

### 10 Transitional—jobkeeper enabling directions etc.

To avoid doubt, the repeal of Divisions 2, 3, 4, 5, 6, 9 and 11 of Part 6-4C of the *Fair Work Act 2009* by this Part has the effect that:

(a) no further jobkeeper enabling directions can be given; and

(b) any jobkeeper enabling directions that were in effect at the time of the repeal cease to have effect from the time of the repeal; and

(c) an agreement under subsection 789GG(2) or 789GJ(2) of that Act ceases to have effect from the time of the repeal.

# Schedule 2—Payment Acts consequential amendments

## Part 1—Coronavirus economic response payments

### *Income Tax Assessment Act 1936*

#### 1 After paragraph 202(s)

Insert:

(sa) to facilitate the administration of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*; and

#### 2 Application

The amendment of section 202 of the *Income Tax Assessment Act 1936* made by this Part applies, from the commencement of this Part, in relation to information obtained or created before, on or after that commencement.

### *Income Tax Assessment Act 1997*

#### 3 Section 11-15 (after table item headed "copyright collecting societies")

Insert:

| | |
|---|---|
| **Coronavirus economic response payment** | |
| certain payments in accordance with the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* | 53-25 |

#### 4 Section 11-55 (after table item headed "cash flow boost")

Insert:

| | |
|---|---|
| **Coronavirus economic response payment** | |
| certain payments in accordance with the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* | 59-95 |

#### 5 At the end of Division 53

Add:

### 53-25 Coronavirus economic response payment

A payment is exempt from income tax if:

(a) the payment is paid in accordance with rules made under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*; and

(b) those rules state that the payment is exempt from income tax.

## 6 At the end of Division 59

Add:

### 59-95 Coronavirus economic response payment

A payment is not assessable income and is not *exempt income if:

(a) the payment is paid in accordance with rules made under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*; and

(b) those rules state that the payment is not assessable income and is not exempt income.

# *Social Security Act 1991*

## 7 At the end of subsection 8(8)

Add:

; (zu) a payment:

(i) paid in accordance with rules made under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*; and

(ii) stated, in those rules, not to be income in relation to the person for the purposes of this Act.

# *Taxation Administration Act 1953*

## 8 Subsection 8AAB(4) (after table item 19A)

Insert:

| | | | |
|---|---|---|---|
| 19B | 10 | *Coronavirus Economic Response Package (Payments and Benefits) Act* | wrong payment or overpayment of a Coronavirus economic response payment |

*2020*

## 9 Section 8AAZA (paragraph (a) of the definition of *credit*)

Repeal the paragraph, substitute:

(a) an amount that the Commissioner must pay to a taxpayer under a taxation law, whether or not described as a credit, other than the following amounts:

(i) an amount paid under the *Product Grants and Benefits Administration Act 2000*;

(ii) an amount paid under Division 18 (refunds) of the *A New Tax System (Luxury Car Tax) Act 1999*;

(iii) an amount paid under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* to an entity, unless a determination of the Commissioner under section 8AAZAA specifies that the amount is a credit for the purposes of this subparagraph; and

## 10 After section 8AAZA

Insert:

### 8AAZAA Amounts relating to Coronavirus economic response payments

(1) The Commissioner may make a written determination that specifies that an amount paid under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* to an entity is a credit for the purposes of subparagraph (a)(iii) of the definition of ***credit*** in section 8AAZA.

(2) A determination under subsection (1) is not a legislative instrument.

## 11 Paragraphs 8WA(1AA)(b) and 8WB(1A)(a) and (b)

After "(s)", insert ", (sa)".

### 12 Application

The amendment of sections 8WA and 8WB of the *Taxation Administration Act 1953* made by this Part apply, from the commencement of this Part, in relation to information obtained or created before, on or after that commencement.

### 13 Subsection 250-10(2) in Schedule 1 (at the end of the table)

Add:

| | | | |
|---|---|---|---|
| 143 | overpayments of Coronavirus economic response payments | subsection 9(3) | *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* |

## *Veterans' Entitlements Act 1986*

### 14 At the end of subsection 5H(8)

Add:

; (zzd) a payment:

(i) paid in accordance with rules made under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*; and

(ii) stated, in those rules, not to be income in relation to the person for the purposes of this Act.

# Part 2—Paid Parental Leave

## *Paid Parental Leave Act 2010*

### 15 Section 6

Insert:

***jobkeeper payment***: see subsection 34(4).

***jobkeeper payment period***: see subsection 34(3).

### 16 Section 30 (paragraph beginning "Division 3")

After "subsequent child.", insert "Any jobkeeper payment period for the person may also be taken into account.".

### 17 Section 32 (note 3)

After "subsection 34(1),", insert "and does not also perform qualifying work on that day because of paragraph (e) of that definition,".

### 18 At the end of section 32

Add:

Note 4: If the person performs qualifying work on a day because of paragraph (e) of the definition of ***qualifying work*** in subsection 34(1), the number of hours of qualifying work the person is taken to have performed on that day is determined in accordance with the PPL rules (see section 35B).

### 19 At the end of subsection 34(1)

Add:

; (e) the day is in a jobkeeper payment period for the person.

### 20 At the end of section 34

Add:

(3) A ***jobkeeper payment period*** for a person is a period for which:

(a) an employer of the person is entitled to one or more jobkeeper payments for the person; or

(b) the person themselves is entitled to one or more jobkeeper payments.

(4) A ***jobkeeper payment*** is a payment that:

(a) is payable by the Commonwealth in accordance with rules made under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*; and

(b) is known as jobkeeper payment.

## 21 After section 35A

Insert:

### 35B Hours of qualifying work on a day in a jobkeeper payment period

(1) For the purposes of step 5 of the method statement in section 32, if a person performs qualifying work on a day because the day is in a jobkeeper payment period for the person, the person is taken to have performed on that day the number of hours of work determined in accordance with the PPL rules.

(2) Subsection (1) has effect:

(a) even if the person also performs qualifying work on that day because of paragraph 34(1)(a), (b), (c) or (d); and

(b) despite section 35A.

# Part 3—Cash flow boosts

## *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020*

### 22 After section 2

Insert:

### 2A Application to external Territories

This Act extends to every external Territory referred to in the definition of ***Australia*** (within the meaning of section 960-505 of the *Income Tax Assessment Act 1997*).

### 23 Subparagraph 5(1)(f)(ii)

After "2020", insert "(or a later time allowed by the Commissioner)".

### 24 At the end of subsection 5(7)

Add:

; and (c) for an entity carrying on business solely in the external Territories—assume that the external Territories are part of the indirect tax zone (within the meaning of that Act).

### 25 Subparagraph 6(1)(d)(ii)

After "2020", insert "(or a later time allowed by the Commissioner)".

### 26 At the end of subsection 6(7)

Add:

; and (c) for an entity carrying on business solely in the external Territories—assume that the external Territories are part of the indirect tax zone (within the meaning of that Act).

# Part 4—Modifications of provisions relating to the social security law

## *Coronavirus Economic Response Package Omnibus Act 2020*

### 27 Subitem 40A(4) of Schedule 11

Insert:

***Minister*** means the Minister administering the *Social Security (International Agreements) Act 1999*.

### 28 Modifications of information management provisions in the social security law

(1) The Social Services Minister may, by legislative instrument, determine modifications of Part 5 of the *Social Security (Administration) Act 1999* in connection with payments under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*, including applications for such payments.

Note: Section 2B of the *Acts Interpretation Act 1901* provides that ***modifications***, in relation to a law, includes additions, omissions and substitutions.

(2) The Social Services Minister must be satisfied that the determination is in response to circumstances relating to the coronavirus known as COVID-19.

(3) A determination under this item has effect accordingly.

(4) An instrument made under this item has no operation after 31 December 2020.

(5) This item is repealed at the end of 31 December 2020.

(6) In this item:

***Social Services Minister*** means the Minister administering the *Social Security (International Agreements) Act 1999*.

# Schedule 3—Guarantee of lending to small and medium enterprises

## *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Act 2020*

### 1 After section 4

Insert:

### 4A Non-ADI lender

For the purposes of paragraph (b) of the definition of ***financial institution*** in section 4, disregard paragraphs 7(2)(i), (ia) and (j) of the *Financial Sector (Collection of Data) Act 2001*.

# Schedule 4—Amendments to support the child care sector

## Part 1—Review of certain CCS decisions

### *A New Tax System (Family Assistance) (Administration) Act 1999*

#### 1 At the end of section 105E

Add:

*Member of a couple for part of a year*

(4) Subsections (5) and (6) apply to the review, under this section, by the Secretary of a child care decision that relates to an individual who is a member of a couple on one or more, but not all, of the first Mondays in CCS fortnights that start in an income year.

(5) The Secretary must apply Part 1 of Schedule 2 to the Family Assistance Act in relation to each CCS fortnight that starts in the income year as if paragraph 3AA(2)(b) of Schedule 3 to the Family Assistance Act had not been enacted.

(6) If the individual is a member of a couple on the first Monday in a CCS fortnight that starts in the income year, the Secretary must apply Part 1 of Schedule 2 to the Family Assistance Act in relation to the fortnight as if:

(a) the individual's adjusted taxable income for the year included the adjusted taxable income for the year for the other member of the couple; and

(b) paragraph 1(3)(b) of Schedule 2 to the Family Assistance Act were replaced with the following paragraph:

"(b) if the individual is a member of a couple on the first Monday in one or more CCS fortnights that start in the income year—CCS the other member of the couple is entitled to be paid for sessions of care provided to the same child in those fortnights.".

(7) To avoid doubt, subsections (5) and (6) have effect despite Part 1 of Schedule 2 to the Family Assistance Act.

## 2 Application

(1) The amendment made by item 1 applies in relation to reviews of child care decisions in relation to sessions of care provided in CCS fortnights starting in the 2019-2020 income year, and later income years.

(2) The amendment made by item 1 has no effect to the extent (if any) to which it would:

(a) result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph); or

(b) impose taxation (within the meaning of section 55 of the Constitution).

# Part 2—Appropriation

## *A New Tax System (Family Assistance) (Administration) Act 1999*

### 3 Subsections 233(2) and (3)

Repeal the subsections, substitute:

(2) However, subsection (1) does not apply to a payment of an amount under an agreement entered into under section 85GA (funding agreements) of the Family Assistance Act unless the payment is for a purpose prescribed by the Minister's rules.

Note: The purposes that may be prescribed by the Minister's rules are limited by subsection 85GA(1) of the Family Assistance Act.

# Part 3—Limits on grant payments made out of standing appropriation

## *A New Tax System (Family Assistance) (Administration) Act 1999*

### 4 At the end of section 233

Add:

(3) The Minister's rules must prescribe the total amount that may be paid in respect of a financial year under subsection (1) because of subsection (2).

(4) Minister's rules for the purposes of subsection (3) for a financial year:

(a) must be made before the start of the financial year; and

(b) may be varied at any time before the financial year ends.

(5) The Minister's rules may prescribe the total amount that may be paid in respect of a financial year under subsection (1) because of subsection (2) for a purpose prescribed by the Minister's rules made for the purposes of subsection (2).

### 5 Transitional—Minister's rules for the financial year beginning on 1 July 2020

Despite paragraph 233(4)(a) of the *A New Tax System (Family Assistance) (Administration) Act 1999*, as inserted by this Part, Minister's rules for the purposes of subsection 233(3) of that Act for the financial year beginning on 1 July 2020 may be made during that financial year.

# Schedule 5—Modification of information and other requirements

## 1 Modification of information and other requirements

(1) This item applies in relation to a provision (an ***affected provision***) of an Act or a legislative instrument that requires or permits any of the following matters (a ***relevant matter***):

(a) the giving of information in writing;
(b) the signature of a person;
(c) the production of a document by a person;
(d) the recording of information;
(e) the retention of documents or information;
(f) the witnessing of signatures;
(g) the certification of matters by witnesses;
(h) the verification of the identity of witnesses;
(i) the attestation of documents.

(2) A responsible Minister for an affected provision may, by legislative instrument, determine that, to the extent that the affected provision relates to a relevant matter:

(a) the affected provision is varied as specified in the determination in relation to a period specified in the determination; or
(b) the affected provision does not apply in relation to a period specified in the determination; or
(c) the affected provision does not apply, and that another provision specified in the determination applies instead, in relation to a period specified in the determination.

(3) The period specified in a determination made under subitem (2) may be a period that starts before this item commences.

(4) A responsible Minister for an affected provision must not make a determination under subitem (2) in relation to the affected provision unless the responsible Minister is satisfied that the determination is in response to circumstances relating to the coronavirus known as COVID-19.

(5) For the purposes of this item, a ***responsible Minister*** for an affected provision is:

(a) if the affected provision is a provision of an Act—any Minister who administers that Act; or

(b) if the affected provision is a provision of a legislative instrument—any Minister who administers the enabling legislation (within the meaning of the *Legislation Act 2003*) under which that legislative instrument is made.

(6) A determination made under subitem (2) has effect accordingly.

(7) A determination made under subitem (2) has no operation after 31 December 2020.

(8) This item is repealed at the end of 31 December 2020.

# Schedule 6—Additional support for veterans etc.

## 1 Definitions

In this Schedule:

***Social Services Minister*** means the Minister administering the *Social Security (International Agreements) Act 1999*.

***veterans' law*** means the following:

(a) the *Veterans' Entitlements Act 1986*;

(b) the *Military Rehabilitation and Compensation Act 2004*;

(c) the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*;

(d) the *Australian Participants in British Nuclear Tests and British Commonwealth Occupation Force (Treatment) Act 2006*;

(e) the *Treatment Benefits (Special Access) Act 2019*.

***Veterans' Minister*** means the Minister administering the *Veterans' Entitlements Act 1986*.

## 2 COVID-19 supplement

(1) If:

(a) a person is receiving a payment of the following kind under the veterans' law:

(i) a pension;

(ii) income support supplement;

(iii) a payment;

(iv) compensation;

(v) an allowance;

(vi) any other pecuniary benefit; and

(b) the payment is determined in an instrument under subitem (2);

then:

(c) the rate of the person's payment is increased by the amount of the COVID-19 supplement for the period determined in that instrument in relation to that payment; and

(d) the amount of the COVID-19 supplement is the fortnightly amount determined in that instrument in relation to that payment.

(2) The Veterans' Minister may, by legislative instrument, make a determination for the purposes of paragraphs (1)(b), (c) and (d). The Veterans' Minister must be satisfied that the determination is in response to circumstances relating to the coronavirus known as COVID-19.

(3) The Veterans' Minister must consult the Social Services Minister before making a determination under subitem (2).

(4) This item ceases to apply at the end of the period covered by subsection 646(2) of the *Social Security Act 1991*.

## 3 Modifications of qualifications and payments under the veterans' law

(1) For any provision of the veterans' law relating to the qualification or eligibility of persons for a payment covered by paragraph 2(1)(a) of this Schedule, or to the rate of such a payment, the Veterans' Minister may, by legislative instrument, determine:

(a) for a provision that relates to the qualification or eligibility of persons for a payment covered by paragraph 2(1)(a) of this Schedule:

(i) that the provision is varied as specified in the determination; or

(ii) that the provision does not apply; or

(iii) that the provision does not apply and that another provision specified in the determination applies instead; or

(b) for a provision that relates to the rate of such a payment:

(i) that the provision is varied as specified in the determination; or

(ii) that the provision does not apply and that a rate of payment specified in the determination applies instead.

(2) The Veterans' Minister must be satisfied that the determination is in response to circumstances relating to the coronavirus known as COVID-19.

(3) The Veterans' Minister must consult the Social Services Minister before making a determination under this item.

(4) A determination under this item has effect accordingly.

(5) An instrument made under this item has no operation after 31 December 2020.

(6) This item is repealed at the end of 31 December 2020.

# Schedule 7—Tax secrecy

## Part 1—Tax secrecy exception

### *Taxation Administration Act 1953*

#### 1 Subsection 355-65(8) in Schedule 1 (at the end of the table)

Add:

| | | |
|---|---|---|
| 11 | the Secretary of the Department | (a) is of information that does not include the name, contact details or *ABN of any entity; and<br>(b) is for the purpose of policy development or analysis in relation to the coronavirus known as COVID-19 (including policy development or analysis in relation to any programs introduced in response to the economic impacts of the coronavirus). |

#### 2 Application

The amendment made by item 1 of this Schedule applies in relation to records and disclosures of information made at or after the commencement of that item, whether the information was obtained before, at or after the commencement of that item.

# Part 2—Repeal of tax secrecy exception

## *Taxation Administration Act 1953*

### 3 Subsection 355-65(8) in Schedule 1 (table item 11)

Repeal the item.

[*Minister's second reading speech made in—*
*House of Representatives on 8 April 2020*
*Senate on 8 April 2020*]

(54/20)

# Part 6-4C—Coronavirus economic response

## Division 1—Introduction

### 789GA Guide to this Part

The purpose of this Part is to assist employers who qualify for the jobkeeper scheme to deal with the economic impact of the Coronavirus known as COVID-19.

This Part authorises an employer who qualifies for the jobkeeper scheme to give a jobkeeper enabling stand down direction to an employee (including to reduce hours of work).

This Part authorises an employer who qualifies for the jobkeeper scheme to give a direction to an employee about:

(a) the duties to be performed by the employee; or

(b) the location of the employee's work.

This Part authorises an employer who qualifies for the jobkeeper scheme and an employee to make an agreement in relation to:

(a) the days or times when the employee is to perform work; or

(b) the employee taking annual leave, including at half pay.

This Part provides that an employer who qualifies for the jobkeeper scheme must consult an employee (or a representative of the employee) before giving a direction.

This Part provides that:

(a) a direction given by an employer who qualifies for the jobkeeper scheme to an employee does not apply to the employee if the direction is unreasonable in all of the circumstances; and

(b) a direction given by an employer who qualifies for the jobkeeper scheme to an employee in relation to the duties to be performed by the employee, or the location of the employee's work, does not apply to the employee unless the employer reasonably believes the direction is necessary to continue the employment of one or more employees of the employer.

This Part provides for other safeguards relating to directions given by employers who qualify for the jobkeeper scheme, including a rule that this Part will at all times operate subject to listed laws.

This Part provides that the FWC may deal with a dispute about the operation of this Part.

Note: The core provisions of this Part (namely, Divisions 2, 3, 4, 5, 6, 9 and 11) will be repealed on 28 September 2020.

## 789GB Object

The object of this Part is to:

(a) make temporary changes to assist the Australian people to keep their jobs, and maintain their connection to their employers, during the unprecedented economic downturn and work restrictions arising from:

(i) the COVID-19 pandemic; and

(ii) government initiatives to slow the transmission of COVID-19; and

(b) help sustain the viability of Australian businesses during the COVID-19 pandemic, including by preparing the Australian economy to recover with speed and strength after a period of hibernation; and

(c) continue the employment of employees; and
(d) ensure the continued effective operation of occupational health and safety laws during the COVID-19 pandemic; and
(e) help ensure that, where reasonably possible, employees:
  (i) remain productively employed during the COVID-19 pandemic; and
  (ii) continue to contribute to the business of their employer where it is safe and possible for the business to continue operating.

## 789GC Definitions

In this Part:

***designated employment provision*** means:
(a) a provision of this Act (other than a provision of this Part or a provision mentioned in section 789GZ); or
(b) a provision of:
  (i) a fair work instrument; or
  (ii) a contract of employment; or
  (iii) a transitional instrument (within the meaning of item 2 of Schedule 3 to the Transitional Act).

***employee*** means a national system employee.

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

***employer*** means a national system employer.

***fortnight*** means a 14-day period beginning on a Monday.

***hourly rate of pay guarantee*** has the meaning given by section 789GDB.

***jobkeeper enabling direction*** means a direction authorised by section 789GDC, 789GE or 789GF.

***jobkeeper payment*** means a payment that:

(a) is payable by the Commonwealth in accordance with the jobkeeper payment rules; and
(b) is known as jobkeeper payment.

***jobkeeper payment rules*** means rules made under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*.

***licence*** includes:
(a) registration; and
(b) permit.

***minimum payment guarantee*** has the meaning given by section 789GDA.

***qualifies for the jobkeeper scheme*** has the same meaning as in the jobkeeper payment rules.

***wage condition*** means the wage condition set out in the jobkeeper payment rules.

# Division 2—Employer payment obligations

## 789GD Obligation of employer to satisfy the wage condition

If:

(a) an employer qualifies for the jobkeeper scheme; and

(b) the employer would be entitled to jobkeeper payment for an employee for a fortnight if (among other things) the employer satisfied the wage condition in respect of the employee for the fortnight;

the employer must ensure that the wage condition has been satisfied in respect of the employee by the end of the fortnight.

Note: 1 This section is a civil remedy provision (see Part 4-1).

Note 2: Under the jobkeeper payment rules, a jobkeeper payment is a payment to an employer for a particular employee for a fortnight.

## 789GDA Minimum payment guarantee

(1) For the purposes of this Part, the ***minimum payment guarantee*** consists of the rule set out in subsection (2).

(2) If a jobkeeper payment is payable to an employer for an employee of the employer for a fortnight, the employer must ensure that the total amount payable to the employee in respect of the fortnight is not less than the greater of the following:

(a) the amount of jobkeeper payment payable to the employer for the employee for the fortnight;

(b) the amounts payable to the employee in relation to the performance of work during the fortnight.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Amounts referred to in this subsection (other than paragraph (a)) include the following, if they become payable in respect of the fortnight:

(a) incentive-based payments and bonuses;

(b) loadings;

(c) monetary allowances;

(d) overtime or penalty rates;
(e) leave payments.

## 789GDB Hourly rate of pay guarantee

(1) For the purposes of this Part, the ***hourly rate of pay guarantee*** consists of the rules set out in subsections (2) and (3).

*Minimum rate of pay—jobkeeper enabling stand down*

(2) If a jobkeeper enabling direction given by an employer under section 789GDC (jobkeeper enabling stand down) applies to an employee of the employer, the employer must ensure that the employee's base rate of pay (worked out on an hourly basis) is not less than the base rate of pay (worked out on an hourly basis) that would have been applicable to the employee if the direction had not been given to the employee.

Note: This subsection is a civil remedy provision (see Part 4-1).

*Minimum rate of pay—duties of work*

(3) If a jobkeeper enabling direction given by an employer under section 789GE (duties of work) applies to an employee of the employer, the employer must ensure that the employee's base rate of pay (worked out on an hourly basis) is not less than the greater of the following:
(a) the base rate of pay (worked out on an hourly basis) that would have been applicable to the employee if the direction had not been given to the employee;
(b) the base rate of pay (worked out on an hourly basis) that is applicable to the duties the employee is performing.

Note: This subsection is a civil remedy provision (see Part 4-1).

*Base rate of pay for certain payment arrangements*

(4) If:
(a) an employee is paid otherwise than:
(i) on an hourly basis; or

(ii) by reference to an hourly rate of pay; and

(b) a workplace instrument applicable to the employee:

(i) specifies the employee's base rate of pay for the purposes of the National Employment Standards; or

(ii) sets out a method for working out the employee's base rate of pay for the purposes of the National Employment Standards;

then, for the purposes of this section, the employee's base rate of pay is:

(c) the amount specified in the workplace instrument; or

(d) the amount worked out using the method set out in the workplace instrument;

as the case requires.

# Division 3—Jobkeeper enabling stand down

## 789GDC Jobkeeper enabling stand down

(1) If:

(a) after the commencement of this section, an employer of an employee gave the employee a direction (the ***jobkeeper enabling stand down direction***) to:

(i) not work on a day or days on which the employee would usually work; or

(ii) work for a lesser period than the period which the employee would ordinarily work on a particular day or days; or

(iii) work a reduced number of hours (compared with the employee's ordinary hours of work);

during a period (the ***jobkeeper enabling stand down period***); and

(b) when the jobkeeper enabling stand down direction was given, the employer qualified for the jobkeeper scheme; and

(c) the employee cannot be usefully employed for the employee's normal days or hours during the jobkeeper enabling stand down period because of changes to business attributable to:

(i) the COVID-19 pandemic; or

(ii) government initiatives to slow the transmission of COVID-19; and

(d) the implementation of the jobkeeper enabling stand down direction is safe, having regard to (without limitation) the nature and spread of COVID-19; and

(e) the employer becomes entitled to one or more jobkeeper payments for the employee:

(i) for a period that consists of or includes the jobkeeper enabling stand down period; or

(ii) for periods that, when considered together, consist of or include the jobkeeper enabling stand down period;

the jobkeeper enabling stand down direction is authorised by this section.

(2) If the jobkeeper enabling stand down direction applies to the employee, then, during the jobkeeper enabling stand down period, the employer is still required to comply with:

(a) section 789GD (which deals with satisfying the wage condition); and

(b) the minimum payment guarantee (see section 789GDA); and

(c) the hourly rate of pay guarantee (see section 789GDB);

but is not otherwise required to make payments to the employee in respect of the jobkeeper enabling stand down period.

(3) The jobkeeper enabling stand down direction does not apply to the employee during a period when the employee:

(a) is taking paid or unpaid leave that is authorised by the employer; or

(b) is otherwise authorised to be absent from the employee's employment.

Note: An employee may take paid or unpaid leave (for example, annual leave) during all or part of a period during which the jobkeeper enabling stand down direction would otherwise apply to the employee.

(4) For the purposes of subparagraph (1)(a)(iii), the reduced number of hours may be nil.

(5) This section has effect despite a designated employment provision.

# Division 4—Duties, location and days of work

## 789GE Duties of work

(1) If:

(a) after the commencement of this section, an employer of an employee directed the employee to perform any duties during a period (the ***relevant period***) that are within the employee's skill and competency; and

(b) when the direction was given, the employer qualified for the jobkeeper scheme; and

(c) those duties are safe, having regard to (without limitation) the nature and spread of COVID-19; and

(d) in a case where the employee was required to have a licence or qualification in order to perform those duties—the employee had the licence or qualification; and

(e) those duties are reasonably within the scope of the employer's business operations; and

(f) the employer becomes entitled to one or more jobkeeper payments for the employee:

(i) for a period that consists of or includes the relevant period; or

(ii) for periods that, when considered together, consist of or include the relevant period;

the direction is authorised by this section.

(2) This section has effect despite a designated employment provision.

## 789GF Location of work

(1) If:

(a) after the commencement of this section, an employer of an employee directed the employee to perform duties during a period (the ***relevant period***) at a place that is different from the employee's normal place of work, including the employee's home; and

(b) when the direction was given, the employer qualified for the jobkeeper scheme; and
(c) the place is suitable for the employee's duties; and
(d) if the place is not the employee's home—the place does not require the employee to travel a distance that is unreasonable in all the circumstances, including the circumstances surrounding the COVID-19 pandemic; and
(e) the performance of the employee's duties at the place is:
(i) safe, having regard to (without limitation) the nature and spread of COVID-19; and
(ii) reasonably within the scope of the employer's business operations; and
(f) the employer becomes entitled to one or more jobkeeper payments for the employee:
(i) for a period that consists of or includes the relevant period; or
(ii) for periods that, when considered together, consist of or include the relevant period;

the direction is authorised by this section.

(2) This section has effect despite a designated employment provision.

### 789GG Days of work etc.

(1) If:
(a) an employer of an employee qualifies for the jobkeeper scheme; and
(b) the employer is entitled to one or more jobkeeper payments for the employee; and
(c) the employer gives the employee a request to make an agreement with the employer under subsection (2);

the employee:
(d) must consider the request; and
(e) must not unreasonably refuse the request.

(2) If:

(a) after the commencement of this section, an employer and an employee of the employer agree in writing to the employee performing duties during a period (the ***relevant period***):

(i) on different days; or

(ii) at different times;

compared with the employee's ordinary days or times of work; and

(b) when the agreement was made, the employer qualified for the jobkeeper scheme; and

(c) the performance of the employee's duties on those days or at those times is:

(i) safe, having regard to (without limitation) the nature and spread of COVID-19; and

(ii) reasonably within the scope of the employer's business operations; and

(d) the agreement does not have the effect of reducing the employee's number of hours of work (compared with the employee's ordinary hours of work); and

(e) the employer becomes entitled to one or more jobkeeper payments for the employee:

(i) for a period that consists of or includes the relevant period; or

(ii) for periods that, when considered together, consist of or include the relevant period;

the agreement is authorised by this section.

(3) This section has effect despite a designated employment provision.

# Division 5—Taking paid annual leave

## 789GJ Taking paid annual leave

(1) If:

(a) the employer of an employee qualifies for the jobkeeper scheme; and

(b) the employer is entitled to one or more jobkeeper payments for the employee; and

(c) the employer gives the employee a request to take paid annual leave; and

(d) complying with the request will not result in the employee having a balance of paid annual leave of fewer than 2 weeks;

the employee:

(e) must consider the request; and

(f) must not unreasonably refuse the request.

(2) If:

(a) after the commencement of this section, an employer and an employee of the employer agree in writing to the employee taking twice as much paid annual leave, at half the employee's rate of pay, for a period (the ***relevant period***); and

(b) when the agreement was made, the employer qualified for the jobkeeper scheme; and

(c) the employer becomes entitled to one or more jobkeeper payments for the employee:

(i) for a period that consists of or includes the relevant period; or

(ii) for periods that, when considered together, consist of or include the relevant period;

the agreement is authorised by this section.

(3) This section has effect despite a designated employment provision.

# Division 6—Rules relating to jobkeeper enabling directions

## 789GK Reasonableness

A jobkeeper enabling direction given by an employer to an employee of the employer does not apply to the employee if the direction is unreasonable in all of the circumstances.

Note: A direction may be unreasonable depending on the impact of the direction on any caring responsibilities the employee may have.

## 789GL Continuing the employment of employees

(1) A jobkeeper enabling direction given by an employer to an employee of the employer under section 789GE (duties of work) or 789GF (location of work) has no effect unless the employer has information before the employer that leads the employer to reasonably believe that the direction is necessary to continue the employment of one or more employees of the employer.

(2) In determining whether a jobkeeper enabling direction given by an employer to an employee of the employer (the ***relevant employee***) is necessary to continue the employment of one or more employees of the employer, it is immaterial that a similar jobkeeper enabling direction could have been given by the employer to an employee of the employer other than the relevant employee.

## 789GM Consultation

(1) A jobkeeper enabling direction given by an employer to an employee of the employer does not apply to the employee unless:
  (a) the employer gave the employee written notice of the employer's intention to give the direction; and
  (b) the employer did so:
    (i) at least 3 days before the direction was given; or
    (ii) if the employee genuinely agreed to a lesser notice period—during that lesser notice period; and

(c) before giving the direction, the employer consulted the employee (or a representative of the employee) about the direction.

(2) The regulations may require that a notice under paragraph (1)(a) must be in a prescribed form.

(3) Subsection (1) does not apply to a jobkeeper enabling direction (the ***relevant direction***) given by an employer to an employee of the employer under a particular section of this Part if:

(a) the employer previously complied with paragraphs (1)(a), (b) and (c) in relation to a proposal to give the employee another direction under that section; and

(b) in the course of consulting the employee (or a representative of the employee) about the proposal, the employee (or the representative of the employee) expressed views to the employer; and

(c) the employer considered those views in deciding to give the relevant direction.

(4) An employer must keep a written record of a consultation under paragraph (1)(c):

(a) with an employee of the employer; or

(b) with a representative of an employee of the employer.

## 789GN Form of direction

(1) A jobkeeper enabling direction must be in writing.

(2) The regulations may require that a jobkeeper enabling direction must be in a prescribed form.

## 789GP Duration

(1) A jobkeeper enabling direction given by an employer to an employee of the employer under a particular section of this Part continues in effect until:

(a) it is withdrawn or revoked by the employer; or

(b) it is replaced by a new jobkeeper enabling direction given by the employer to the employee under that section.

(2) Subsection (1) has effect subject to:
(a) subsection (3); and
(b) an order made by the FWC under Division 10.

(3) A jobkeeper enabling direction ceases to have effect at the start of 28 September 2020.

## 789GQ Compliance

If a jobkeeper enabling direction given by an employer applies to an employee of the employer, the employee must comply with the direction.

# Division 7—Service

## 789GR Service

(1) For the purposes of this Act, if an employee is subject to a jobkeeper enabling direction during a period, that period counts as service.

(2) Subsection (1) has effect in addition to section 22.

# Division 8—Accrual rules

## 789GS Accrual rules

(1) If a jobkeeper enabling direction under section 789GDC (jobkeeper enabling stand down) applies to an employee, the employee accrues leave entitlements as if the direction had not been given.

(2) If a jobkeeper enabling direction under section 789GDC (jobkeeper enabling stand down) applies to an employee, the following are to be calculated as if the direction had not been given:
  (a) redundancy pay;
  (b) payment in lieu of notice of termination.

(3) If an employee takes paid annual leave in accordance with an agreement under subsection 789GJ(2), the employee accrues leave entitlements as if the agreement had not been made.

(4) If an employee takes paid annual leave in accordance with an agreement under subsection 789GJ(2), the following are to be calculated as if the agreement had not been made:
  (a) redundancy pay;
  (b) payment in lieu of notice of termination.

# Division 9—Employee requests for secondary employment, training etc.

## 789GU Employee requests for secondary employment, training etc.

If:

(a) a jobkeeper enabling direction given by an employer under section 789GDC (jobkeeper enabling stand down) applies to an employee of the employer; and

(b) the employee gives the employer any of the following requests:

(i) a request to engage in reasonable secondary employment;

(ii) a request for training;

(iii) a request for professional development;

the employer:

(c) must consider the request; and

(d) must not unreasonably refuse the request.

Note: This section is a civil remedy provision (see Part 4-1).

# Division 10—Dealing with disputes

## 789GV FWC may deal with a dispute about the operation of this Part

(1) The FWC may deal with a dispute about the operation of this Part.

(2) The FWC may deal with a dispute by arbitration.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

(3) The FWC may deal with a dispute only on application by any of the following:
- (a) an employee;
- (b) an employer;
- (c) an employee organisation;
- (d) an employer organisation.

(4) The FWC may make any of the following orders:
- (a) an order that the FWC considers desirable to give effect to a jobkeeper enabling direction;
- (b) an order setting aside a jobkeeper enabling direction;
- (c) an order:
  - (i) setting aside a jobkeeper enabling direction; and
  - (ii) substituting a different jobkeeper enabling direction;
- (d) any other order that the FWC considers appropriate.

(5) The FWC must not make an order under paragraph (4)(a) or (c) on or after 28 September 2020.

(6) An order made by the FWC under paragraph (4)(a) ceases to have effect at the start of 28 September 2020.

(7) In dealing with the dispute, the FWC must take into account fairness between the parties concerned.

## 789GW Contravening an FWC order dealing with a dispute about the operation of this Part

A person must not contravene a term of an FWC order dealing with a dispute about the operation of this Part.

Note: This section is a civil remedy provision (see Part 4-1).

# Division 11—Exclusions

## 789GX Exclusions

The Minister may, by legislative instrument, exclude one or more specified employers from the operation of any or all of the following provisions:

(a) section 789GDC;
(b) section 789GE;
(c) section 789GF;
(d) section 789GG;
(e) section 789GJ.

# Division 12—Protections

## 789GXA Misuse of jobkeeper enabling direction

An employer must not purport to give a jobkeeper enabling direction if:

(a) the direction is not authorised by this Part; and

(b) the employer knows that the direction is not authorised by this Part.

Note: This section is a civil remedy provision (see Part 4-1).

## 789GY Protection of workplace rights

For the avoidance of doubt, each of the following is a workplace right within the meaning of Part 3-1:

(a) the benefit that an employee of an employer has or derives because of an obligation of the employer under section 789GD to satisfy the wage condition;

(b) agreeing, or not agreeing, to perform duties:

(i) on different days; or

(ii) at different times;

in accordance with subsection 789GG(2);

(c) agreeing, or not agreeing, to take paid annual leave in compliance with a request under subsection 789GJ(1);

(d) agreeing, or not agreeing, to take paid annual leave in accordance with subsection 789GJ(2);

(e) making a request under section 789GU (secondary employment, training etc.).

## 789GZ Relationship with other laws etc.

(1) This Part will at all times operate subject to the following:

(a) Division 2 of Part 2-9 (payment of wages etc.);

(b) Part 3-1 (general protections);

(c) Part 3-2 (unfair dismissal);

(d) section 772 (employment not to be terminated on certain grounds);
(e) an anti-discrimination law;
(f) a law of the Commonwealth, a State or a Territory, so far as the law deals with health and safety obligations of employers or employees;
(g) a law of the Commonwealth, a State or a Territory, so far as the law deals with workers' compensation.

(2) This Part has effect subject to a person's right to be represented, or collectively represented, by an employee organisation or employer organisation.

## 789GZA Redundancy

The giving of a jobkeeper enabling direction does not amount to a redundancy.

# Division 13—Review of this Part

## 789GZB Review of this Part

(1) The Minister must cause an independent review to be conducted of the operation of this Part.

(2) The review must start on or before:
  (a) 28 July 2020; or
  (b) if a later day is specified in the regulations—that later day.

(3) The persons who conduct the review must:
  (a) complete the review; and
  (b) give the Minister a written report of the review;
  on or before:
  (c) 8 September 2020; or
  (d) if a later day is specified in the regulations—that later day.

(4) The Minister must cause a copy of the report to be tabled in each House of the Parliament within 5 sitting days of that House after the report is given to the Minister.

2019-2020

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

---

# CORONAVIRUS ECONOMIC RESPONSE PACKAGE (PAYMENTS AND BENEFITS) BILL 2020
# CORONAVIRUS ECONOMIC RESPONSE PACKAGE OMNIBUS (MEASURES NO. 2) BILL 2020

---

## EXPLANATORY MEMORANDUM

(Circulated by authority of the
Treasurer, the Hon. Josh Frydenberg MP)

# *Table of contents*

# Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

| *Abbreviation* | *Definition* |
|---|---|
| ABN | *Australian Business Number* |
| ADI | Authorised deposit-taking institution |
| Bill | Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020 |
| Child Care Subsidy Minister's Rules | *Child Care Subsidy Minister's Rules 2017* |
| Commissioner | Commissioner of Taxation |
| Coronavirus | Coronavirus known as COVID-19 |
| Coronavirus Omnibus Act | *Coronavirus Economic Response Package Omnibus Act 2020* |
| Criminal Code | The Schedule to the *Criminal Code Act 1995* called the *Criminal Code* |
| Fair Work Act | *Fair Work Act 2009* |
| FWC | Fair Work Commission |
| Family Assistance Act | *A New Tax System (Family Assistance) Act 1999* |
| Family Assistance Administration Act | *A New Tax System (Family Assistance) (Administration) Act 1999* |
| Family Assistance Law | *A New Tax System (Family Assistance) Act 1999*, *A New Tax System (Family Assistance) (Administration) Act 1999* and the relevant subordinate legislation |
| GST Act | *A New Tax System (Goods and Services Tax) Act 1999* |
| Guarantee of Lending Act | *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Act 2020* |
| ILO | International Labour Organization |
| ITAA 1936 | *Income Tax Assessment Act 1936* |
| ITAA 1997 | *Income Tax Assessment Act 1997* |

| ***Abbreviation*** | ***Definition*** |
|---|---|
| NES | National Employment Standards |
| Payments and Benefits Bill | *Coronavirus Economic Response Package (Payments and Benefits) Bill 2020* |
| PPL Act | *Paid Parental Leave Act 2010* |
| PPL Rules | *Paid Parental Leave Rules 2010* |
| SME | Small and medium enterprise |
| Social Security Act | *Social Security Act 1991* |
| Social Services Minister | The Minister administering the *Social Security (International Agreement) Act 1999* |
| SSAA | *Social Security (Administration) Act 1999* |
| TAA 1953 | *Taxation Administration Act 1953* |
| Veterans' Law | Means the following Acts:<br>• *Veterans' Entitlements Act 1986*;<br>• *Military Rehabilitation and Compensation Act 2004*;<br>• *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*;<br>• *Australian Participants in British Nuclear Tests and British Commonwealth Occupational Force (Treatment) Act 2006*; and<br>• *Treatment Benefits (Special Access) Act 2019*. |
| Veterans' Minister | The Minister administering the *Veterans' Entitlements Act 1986* |

# General outline and financial impact

## Overview

This legislative package contains a number of bills to implement the Government's economic response to the spread of the Coronavirus.

- Coronavirus Economic Response Package (Payments and Benefits) Bill 2020.
- Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020.

Further details on the measures contained in each of these bills and the Government's economic response to the spread of the Coronavirus are detailed below and in the subsequent chapters.

## Schedule 1 – Amendment of the Fair Work Act 2009

*This Schedule was prepared by the Attorney-General's Department.*

Schedule 1 to this Bill amends the Fair Work Act to support the practical operation of the JobKeeper scheme in Australian workplaces in the national workplace relations system and keep Australians employed.

Part 1 of Schedule 1 to the Bill inserts new Part 6-4C into the Fair Work Act, which temporarily enables employers to issue JobKeeper enabling directions. These can provide (subject to various safeguards) for increased flexibility around employees' hours of work via a new JobKeeper enabling stand down direction, performance of duties and location of work. It also enables employers and employees to make agreements for increased flexibility around annual leave arrangements and days and times of work. The FWC will be able to resolve disputes, including by arbitration.

New Part 6-4C also requires JobKeeper qualifying employers to meet minimum payment obligations to employees who are subject to these arrangements, including by ensuring that at least the value of JobKeeper payments they receive through the Commissioner is passed on to such employees each fortnight, or the amount they would receive for the work they have performed if that would be greater.

New Part 6-4C also includes rules about accrual of service and calculation of benefits in certain circumstances.

***Date of effect***: Schedule 1 to this Bill will commence on the day after the day on which this Bill receives Royal Assent.

***Proposal announced***: The JobKeeper scheme was announced on 30 March 2020.

***Financial impact***: Nil.

***Human rights implications***: This Schedule raises human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 8.

***Compliance cost impact***: An exemption from Regulation Impact Statement requirements was granted by the Prime Minister as there were urgent and unforeseen events.

## Schedule 2 – Coronavirus Economic Response Package (Payments and Benefits) Bill 2020 and consequential amendments

*This Schedule was prepared by the Department of the Treasury.*

The Australian Government is acting decisively in the national interest to address the significant economic consequences of the Coronavirus, without a permanent or structural impact on the budget balance.

The Payments and Benefits Bill is a key part of the Commonwealth response to the potential national emergency arising from the spread of the Coronavirus. It provides a framework for financial support to be provided by the Commissioner to assist businesses and their employees through the downturn.

The Payments and Benefits Bill establishes a framework to administer the Coronavirus economic response payments. Under the framework, the Treasurer will be able to make rules to provide for payments administered by the Commissioner. This allows for flexibility of the payment arrangements and ensures the robustness of the eligibility criteria to appropriately respond to the impacts of the Coronavirus.

The design of the framework recognises that the Commissioner, through existing arrangements, makes payments to and receives payments from taxpayers as part of the administration of the tax law. Therefore, the Commissioner is well placed to administer payment programs to individuals and businesses, but requires specific legislative authority to facilitate this.

The JobKeeper Payments announced on 30 March 2020 are intended to be delivered under this framework. These payments will support businesses to keep more Australian workers in jobs through the course of the Coronavirus.

***Date of effect***: The Payments and Benefits Bill provides for rules to be made allowing the Commissioner to make payments on or after the day of

commencement, for the period between 1 March 2020 and 31 December 2020 (inclusive).

***Proposal announced***: The JobKeeper scheme was announced on 30 March 2020.

***Financial impact***: This measure is estimated to have the following direct financial impact, via JobKeeper payments to eligible employers and employees, over the forward estimates period in underlying cash balance terms ($ billions):

| *2019-20* | *2020-21* | *2021-22* | *2022-23* | *2023-24* | *Total* |
|---|---|---|---|---|---|
| -40 | -90 | – | – | – | -130 |

***Human rights implications***: The Payments and Benefits Bill and Schedule 2 to this Bill do not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 8.

***Compliance cost impact***: An exemption from Regulation Impact Statement requirements was granted by the Prime Minister as there were urgent and unforeseen events.

## Schedule 3 – Guarantee of lending to small and medium enterprises

*This Schedule was prepared by the Department of the Treasury.*

Schedule 3 to this Bill makes technical amendments to the Guarantee of Lending Act. The amendments ensure that certain categories of smaller non-ADI lenders will fall within the definition of *financial institution* in that Act.

***Date of effect***: Schedule 3 to this Bill will commence on the day after the day on which this Bill receives Royal Assent.

***Proposal announced***: This measure has not previously been announced.

***Financial impact***: Unquantifiable.

***Human rights implications***: Schedule 3 to this Bill does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 8.

***Compliance cost impact***: An exemption from Regulation Impact Statement requirements was granted by the Prime Minister as there were urgent and unforeseen events.

## Schedule 4 – Amendments to support the child care sector

*This Schedule was prepared by the Department of Education, Skills and Employment.*

Schedule 4 to this Bill amends the Family Assistance Administration Act to:

- modify the calculation method used for Child Care Subsidy reconciliation to ensure a consistent outcome for individuals who have changed their relationship status during the financial year; and
- meet various circumstances of social and financial hardship being experienced by the child care sector and families, arising from emergency and disaster events including the Coronavirus by ensuring that payments of Additional Child Care Subsidy and certain grants can draw upon standing appropriations.

The amendments also require that the Minister make rules which prescribe the total amount that can be paid in a financial year.

***Date of effect***: The amendments to modify the calculation method used for Child Care Subsidy reconciliation take effect from the first Child Care Subsidy fortnight after this Bill receives Royal Assent.

The amendments which ensure that payments of Additional Child Care Subsidy and grants can draw upon standing appropriations take effect from the day after the day on which this Bill receives Royal Assent.

The requirement that a total cap must be prescribed to limit the amount that can be drawn from special appropriations will take effect from 1 July 2020.

***Proposal announced***: The modifications to the Child Care Subsidy reconciliation were included in the Family Assistance Legislation Amendment (Improving Assistance for Vulnerable and Disadvantaged Families) Bill 2020 which was introduced into Parliament on 26 February 2020.

The other amendments in Schedule 4 to this Bill have not previously been announced**.**

***Financial impact***: It is not possible to determine the financial impact of the measures in Schedule 4 to this Bill as it will depend on sector need for additional financial assistance as a result of emerging issues and impacts from the Coronavirus.

***Human rights implications***: Schedule 4 to this Bill does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 8.

***Compliance cost impact***: An exemption from Regulation Impact Statement requirements was granted by the Prime Minister as there were urgent and unforeseen circumstances.

## Schedule 5 – Modification of information and other requirements

*This Schedule was prepared by the Attorney-General's Department.*

Schedule 5 to this Bill provides a temporary mechanism for responsible Ministers to change arrangements for meeting information and documentary requirements under Commonwealth legislation in response to the challenges posed by the Coronavirus.

***Date of effect***: Schedule 5 to this Bill will commence on the day after the day on which this Bill receives Royal Assent.

***Proposal announced***: This measure has not previously been announced.

***Financial impact***: Nil.

***Human rights implications***: Schedule 5 to this Bill does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 8.

***Compliance cost impact***: An exemption from Regulation Impact Statement requirements was granted by the Prime Minister as there were urgent and unforeseen events.

## Schedule 6 – Additional support for veterans

*This Schedule was prepared by the Department of Veterans' Affairs.*

Schedule 6 to this Bill allows the Veterans' Minister to:

- increase, by legislative instrument, the amount paid to persons receiving a payment under a provision of the Veterans' Law by the amount of the COVID-19 supplement; and
- vary the qualifications and eligibility for payments under the Veterans' Law by legislative instrument.

These instruments may only be made after consultation with the Social Services Minister. Both the powers and any instruments made using them will end on 31 December 2020.

***Date of effect***: Schedule 6 to this Bill will commence on the day after the day on which this Bill receives Royal Assent.

***Proposal announced***: This measure has not previously been announced.

***Financial impact***: The financial impact of the extension to veterans and their dependents has not been separately costed. These costs, and costs of any variation to the qualifications and benefits under the Veterans' Law, will be separately costed when the relevant legislative instrument is developed.

***Human rights implications***: Schedule 6 to this Bill does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 8.

***Compliance cost impact***: An exemption from Regulation Impact Statement requirements was granted by the Prime Minister as there were urgent and unforeseen circumstances.

## Schedule 7 – Tax secrecy

*This Schedule was prepared by the Department of the Treasury.*

Schedule 7 to this Bill makes amendments to the tax secrecy provisions in the TAA 1953 to allow de-identified protected information to be disclosed to the Treasury for the purposes of policy development, or analysis, in relation to the Coronavirus, including in relation to programs introduced in response to the economic impacts of the Coronavirus. The amendments allow such disclosures to be made until 30 June 2023.

***Date of effect***: Schedule 7 to this Bill will commence on the day after the day on which this Bill receives Royal Assent. These amendments are repealed on 1 July 2023.

***Proposal announced***: This measure has not previously been announced.

***Financial impact***: Nil.

***Human rights implications***: Schedule 7 to this Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. See *Statement of Compatibility with Human Rights* — Chapter 8.

***Compliance cost impact***: An exemption from Regulation Impact Statement requirements was granted by the Prime Minister as there were urgent and unforeseen circumstances.

# Economic Response to the Coronavirus

The Government is acting decisively in the national interest to support households and businesses and address the significant economic consequences of the Coronavirus.

While the full economic effects from the virus remain uncertain, the global and domestic outlook has deteriorated since the Government's initial Economic Response announced on 12 March 2020.

The spread of the virus worldwide has broadened and is expected to be more prolonged. Governments, both international and domestic, have announced stricter mitigation measures to slow the spread of the virus, which are having significant economic impacts.

Since it announced its second set of economic responses on 22 March 2020, the Government has announced further support for businesses and households, including the $130 billion JobKeeper Program.

Combined with the Government's previous actions, this totals $320 billion across the forward estimates, representing 16.4 per cent of annual Gross Domestic Product.

These actions provide timely support to affected workers, businesses and the broader community.

## How the Coronavirus will affect the global and Australian economies

The outbreak of the virus has expanded and is a rapidly evolving challenge with significant health impacts. While the outbreak originated in China, significant outbreaks have occurred in almost all countries around the world. There are more than 190 countries reporting infections.

Our health system is well prepared to manage this outbreak. We have a world-class health system which has pandemic plans that are currently activated. The Government has put in place strong measures to protect Australians, including:

- activating the National Incident Room;
- releasing masks and other Personal Protective Equipment from the National Medical Stockpile;
- enhancing border controls and imposing strict travel restrictions; and

- promoting social distancing to limit the spread.

The Government will continue to respond as the situation develops.

The Government's commitment of $3.6 billion to manage the outbreak in Australia will strengthen the health system's ability to manage the Coronavirus in the community and protect vulnerable Australians. In addition, the Government has agreed with the States and the Territories to share the public health costs incurred by the States in treating the Coronavirus.

For aged care, temporary measures will be introduced to support the aged care sector with an additional $444.6 million. This includes funding for a retention bonus to ensure the continuity of the workforce in both residential and home care as well as funding to support the viability of residential aged care facilities. This is in addition to more than $100 million that the Government previously announced to support the aged care workforce.

The Coronavirus outbreak not only affects people's health. The virus, along with the increasing health measures to slow its spread, will have significant economic implications.

The international economic outlook has worsened as the Coronavirus has spread.

While the initial economic impact of the outbreak was most significantly felt in the Chinese economy, this has quickly evolved to other countries and regions. Major economies including the United Kingdom, Italy and Spain have announced they are in 'lockdown' to contain the Coronavirus, which is expected to hinder economic activity over coming months.

In China, a range of economic indicators are showing that the Chinese economy has been severely impacted. A survey measure of activity in the manufacturing sector had its largest fall in its history in February. China also had record falls for industrial production, retail sales and fixed asset investment over January and February. Trade for this period was also significantly affected.

Given China's interconnectedness with the world, and its key role in supply chains, this decline will have flow-on economic impacts for the world. But concerns about flow-on effects have been magnified as more countries take direct action to slow the Coronavirus spread. In particular, across the world we have seen a substantial increase in the breadth and severity of restrictions on the movement of people. And this is showing up in confidence indicators in Europe, the United States and Asia.

The global nature of the shock is evident in financial markets. Stock markets have fallen substantially around the world in recent weeks, while

corporate bond spreads have widened. The Australian dollar is 11 per cent lower on a trade-weighted basis than it was in early January.

While markets initially incorporated sharp downward revisions to the economic outlook in an orderly way with few signs of dislocation, more recently we have seen significant financial market strains. Financial authorities around the world have responded with a range of measures to support market functioning and economic activity.

Oil prices have continued to fall, and are now around 65 per cent lower than prices in early January, reflecting falling global demand and the collapse of an agreement between major producers to reduce output. While oil-linked Liquefied Natural Gas export prices will be negatively affected by these falls, consumers will benefit from lower petrol and gas prices.

In contrast, prices of key bulk commodities have remained resilient to date. This is likely due to an expectation that the Chinese authorities will move to boost domestic demand through ongoing measures, including increased investment in infrastructure.

In response to the Coronavirus outbreak, fiscal authorities in numerous countries have announced measures to support their health systems and their economies. Governments are supporting the sectors and workers most affected by the outbreak, and we are continuing to see the announcement of policies to help households and businesses cope as unprecedented shut-downs occur. Such policies have included loan arrangements, tax deferrals and relief, cash payments and income support. Monetary policy is also responding with around 70 central banks across the world easing policy in 2020 so far.

Australia's position heading into this crisis is stronger than many, with both the International Monetary Fund and the Organisation for Economic Co-operation and Development having forecast Australia to grow faster than comparable economies, including the United Kingdom, Canada, Japan, Germany and France.

Australian governments continue to act quickly and decisively to adjust our health measures to the scale of the threat. This scaling up of measures to protect the health of our community will have negative effects on the economy. Demand for goods and services will be lowered, and this will be concentrated in some industries such as tourism, hospitality and retail trade. Some businesses will be unable to operate in the usual way owing to restrictions on large gatherings, or may face labour or supply chain challenges.

There remains considerable uncertainty around the economic implications of the Coronavirus for the June quarter and beyond, but the economic shock will be significant. There are a wide range of potential paths for the spread and containment of the virus globally and in Australia. In addition,

there is uncertainty around the impact on confidence, people's ability to work and business cash flow. The global spread of the Coronavirus and its global economic impact will also flow through to demand for Australia's exports and the availability of inputs into domestic production and imported consumption goods.

There are automatic mechanisms that will help to support activity. The flexible exchange rate helps to mitigate the effect of shocks to global demand, we have a sound and well-capitalised banking sector and our labour market has shown that it can flexibly respond — with firms adjusting more through hours, than the number of employees.

## How the Government is responding

The Government's consolidated package of $320 billion represents fiscal and balance sheet support across the forward estimates of 16.4 per cent of annual Gross Domestic Product. The support is designed to help businesses and households through the period ahead. This significant action has been taken in the national interest and has been updated in the light of the broader and more prolonged impact of the Coronavirus outbreak.

The package provides timely support to workers, households and businesses through a difficult time. Building on the previous measures, this package will support those most severely affected. It is also designed to position the Australian economy to recover strongly once the health challenge has been overcome.

The International Monetary Fund and the Organisation for Economic Co-operation and Development have indicated that Australia is one of the advanced economies in the best positions to provide fiscal support without endangering debt sustainability.

# *Chapter 1*
# *Amendment of the Fair Work Act 2009*

## Outline of chapter

1.1 Schedule 1 to this Bill amends the Fair Work Act to support the practical operation of the JobKeeper scheme in Australian workplaces in the national system and keep Australians employed.

## Context of amendments

1.2 The JobKeeper scheme will help employers who qualify for the JobKeeper scheme retain staff during the downturn caused by the Coronavirus pandemic and support business recovery when conditions improve. JobKeeper payments are payable to qualifying employers for a maximum of 13 fortnights in respect of each eligible employee on their books on 1 March 2020 who is retained by the employer. Qualifying employers will receive a payment (fortnightly in arrears) of $1,500 per fortnight for each eligible employee.

## Summary of new law

1.3 Part 1 of Schedule 1 to this Bill inserts new Part 6-4C into the Fair Work Act, which temporarily enables employers to issue JobKeeper enabling directions. These can provide (subject to various safeguards) for increased flexibility around employees' hours of work via a new JobKeeper enabling stand down direction, performance of duties and location of work. It also enables employers and employees to make agreements for increased flexibility around annual leave arrangements and days and times of work. The FWC will be able to resolve disputes, including by arbitration.

1.4 New Part 6-4C also requires JobKeeper qualifying employers to meet minimum payment obligations to employees who are subject to these arrangements, including by ensuring that at least the value of JobKeeper payments they receive through the Commissioner is passed on to such employees each fortnight, or the amount they would receive for the work they have performed if that would be greater.

1.5 New Part 6-4C also contains:

- rules about accrual of service and calculation of benefits in certain circumstances; and

- rules about its interaction with other laws.

1.6 The amendments made by Part 1 of Schedule 1 to this Bill will enable the greatest number of workplaces in the national workplace relations system to access and make best use of the Jobkeeper scheme, with a view to preserving the greatest number of jobs.

1.7 These amendments are time-limited and will automatically be repealed by Part 2 of Schedule 1 on 28 September 2020.

## Detailed explanation of new law

### Schedule 1—Amendment of the Fair Work Act 2009

***Item 1 – Subsection 539(2) (at the end of the table)***

1.8 This item inserts new items 39, 40 and 41 into the table in subsection 539(2) of the Fair Work Act to provide rules about standing, jurisdiction and penalties for contravention of sections 789GD, 789GDA(2), 789GDB(2), 789GDB(3), 789GU, 789GW and 789GXA (explained below), which are civil remedy provisions.

1.9 Contravention of section 789GD, which is about an employer's obligation to satisfy the wage condition set out in the JobKeeper payment rules, could amount to a serious contravention that can carry a penalty of up to 600 penalty units (see section 557A of the Fair Work Act). A maximum civil penalty of 600 penalty units also applies to an employer who knowingly misuses a purported job keeper enabling direction that is not authorised by new Part 4-6C (section 789GXA).

***Item 2 – At the end of subsection 576(1)***

1.10 Item 2 of Schedule 1, Part 1 amends subsection 576(1) of the Fair Work Act to provide that the FWC has functions conferred in relation to the Coronavirus economic response provided for in new Part 6-4C of the Fair Work Act.

***Item 3 3 – After paragraph 675(2)(j)***

1.11 Item 3 of Schedule 1, Part 1 amends subsection 675(2) of the Fair Work Act to provide that a person does not commit an offence if they contravene an FWC order under new Part 6-4C.

***Item 4 – At the end of subsection 716(1)***

1.12 Item 4 amends subsection 716(1) to enable an inspector to issue a compliance notice for contravention of a provision of Part 6-4C, a

JobKeeper enabling direction or a provision of an agreement authorised by Part 6-4C.

***Item 5 – Part 6-4C—Coronavirus economic response.***

*Section789GA (Guide to Part 6-4C)*

1.13 Item 5 of Schedule 1, Part 1 inserts new Part 6-4C into the Fair Work Act.

1.14 New section 789GA provides the Guide to Part 6-4C, which notes that the Part's purpose is to assist employers who qualify for the Jobkeeper scheme to deal with the economic impact of the Coronavirus pandemic.

1.15 Part 6-4C also authorises an employer who qualifies for the JobKeeper scheme to give a:

- JobKeeper enabling stand down direction to an employee (including to reduce hours of work);
- direction to an employee about the duties to be performed by the employee, and
- direction to an employee about the location of the employee's work.

1.16 The Part also authorises an employee who qualifies for the JobKeeper scheme and an employee to make agreements in relation to the days or times of work, and taking paid annual leave, including at half pay.

1.17 The Guide also notes that:

- an employer must consult the employee (or a representative of the employee) before giving a direction;
- directions must (among other things) not be unreasonable in all of the circumstances, and directions in relation to duties to be performed by an employee or their location of work must be supported by an employer's reasonable belief this is necessary for the continued employment of one or more employees of the employer;
- safeguards apply in relation to directions, including that new Part 6-4C operates at all times subject to particular listed laws (which contain other safeguards), and
- the FWC may deal with disputes about the operation of Part 6-4C.

*Section 789GB (Object)*

1.18 Section 789GB provides the object of Part 6-4C, which is to:

- make temporary changes to assist the Australian people to keep their jobs, and maintain their connection to their employers, during the unprecedented economic downturn and work restrictions arising from:
  - the Coronavirus pandemic; and
  - government initiatives to slow the transmission of Coronavirus;
- help sustain the viability of Australian businesses during the COVID-19 pandemic, including by preparing the Australian economy to recover with speed and strength after a period of hibernation;
- continue the employment of employees;
- ensure the continued effective operation of occupational health and safety laws during the Coronavirus pandemic; and
- help ensure that, where reasonably possible, employees:
  - remain productively employed during the Coronavirus pandemic, and
  - continue to contribute to the business of their employer where it is safe and possible for the business to continue operating.

*Section 789GC (Definitions)*

1.19 This provision sets out definitions for Part 6-4C, as follows:

- ***designated employment provision*** – which refers to:
  - a provision of the Fair Work Act (other than a provision of new Part 6-4C or a provision mentioned in section 789GZ);
  - a fair work instrument (see section 12);
  - a contract of employment; or
  - a transitional instrument.
- ***employee*** and ***employer*** – these are references to the definitions of *national system employer* and *national system employee* (see sections 13, 14, 30C, 30D, 30M and 30N of the Fair Work Act, which engage Commonwealth constitutional powers including the corporations power (s51(xx)) and the power to legislate with respect to matters referred by States (s51(xxxvii)).

- ***fortnight*** – which means a 14-day period beginning on a Monday.
- ***hourly rate of pay guarantee*** – which has the meaning given by section 789GDB.
- ***jobkeeper enabling direction*** – which means a direction authorised by sections 789GDC, 789GE or 789GF.
- ***jobkeeper fortnight*** – which has the same meaning as in the jobkeeper payment rules.
- ***jobkeeper payment*** – which means the jobkeeper payment payable by the Commonwealth in accordance with the jobkeeper payment rules.
- ***jobkeeper payment rules*** – which means the rules made under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*.
- ***jobkeeper scheme*** – which has the same meaning as in the jobkeeper payment rules.
- ***licence*** – which includes registrations and permits.
- ***minimum payment guarantee*** – which has the meaning in section 789GDA.
- ***qualifies for the jobkeeper scheme*** – which has the same meaning as in the jobkeeper payment rules.
- ***wage condition*** – which means the wage condition set out in the JobKeeper payment rules.

***Division 2—Employer payment obligations***

*Section 789GD (Obligation of employer to satisfy the wage condition)*

1.20 Sections 6(1)(d) and 10 of the JobKeeper payment rules require the sum of amounts paid (or otherwise handled in ways permitted by those rules, such as by making salary sacrifice superannuation contributions for employees or withholding tax amounts) by an employer who is entitled to a JobKeeper payment for an individual for a fortnight, to equal or exceed $1,500 in the fortnight (this is the *wage condition* of the JobKeeper payment rules).

1.21 New section 789GD requires an employer that qualifies for the JobKeeper scheme, and would be entitled to the JobKeeper payment for a particular employee by satisfying the wage condition in respect of that employee, to ensure the wage condition is in fact satisfied by the end of the fortnight. This effectively requires the employer to pay their employee (or otherwise deal with amounts in ways permitted by the JobKeeper payment rules) the fortnightly value of the JobKeeper payment.

1.22 Section 789GD is a civil remedy provision enforceable under Part 4-1 of the Fair Work Act, which provides access to the courts for (among other things) penalty and compensation orders to remedy contraventions upon application by an employee, employee representative or an inspector.

1.23 Note 2 to section 789GD makes it clear that under the JobKeeper payment rules, a JobKeeper payment is a payment to an employer for a particular employee for a fortnight.

*Section 789GDA (Minimum payment guarantee)*

1.24 Section 789GDA requires an employer who is eligible for the Jobkeeper scheme to ensure the total amount payable to a particular employee in respect of a fortnight is either:

- the amount of the JobKeeper payment for the employee; or
- if a greater amount is payable to the employee for the performance of work during the fortnight, that amount (in full).

1.25 Subsection 789GDA(2) is a civil remedy provision enforceable under Part 4-1 of the Fair Work Act, which provides access to the courts for (among other things) penalty and compensation orders to remedy contraventions.

*Section 789GDB (Hourly rate of pay guarantee)*

1.26 A JobKeeper enabling stand down direction cannot reduce an employee's hourly base rate of pay. Section 789GDB(2) requires an employer who is eligible for the JobKeeper scheme to ensure that where an employee is given a JobKeeper enabling stand down direction under section 789GDC, the employee's base rate of pay worked out on an hourly basis is not less than the base rate of pay worked out on an hourly basis that would have applied to the employee if the direction had not been given.

1.27 Section 789GDB(3) similarly requires an employer who is eligible for the JobKeeper scheme to ensure that where an employee is given a direction about their work duties under section 789GE, the employee's hourly base rate of pay is not less than the greater of:

- the base rate of pay on an hourly basis that would have applied if the direction had not been given; or
- the base rate of pay on an hourly basis applicable to the duties performed.

1.28 This effectively means that an employee's hourly rate cannot be reduced as a result of a JobKeeper enabling direction.

1.29 Subsections 789GDB(2) and 789GDB(3) constitute the *hourly rate of pay guarantee* (subsection 789GDB(1)).

1.30 Section 789GDB(4) provides that if an employee is paid otherwise than on an hourly basis (or by reference to an hourly pay rate) and an applicable workplace instrument specifies the employee's base rate of pay for the purposes of the NES or sets a method for working out the employee's base rate of pay for that purpose, the employee's base rate of pay is:

- the amount specified in that instrument, or
- the amount worked out using that method (as the case requires).

1.31 This is designed to ensure that employees paid other than by reference to hours, such as on an annualised salary arrangement, have clear rules for how their pay arrangements are treated for the purpose of the hourly rate of pay guarantee.

1.32 Subsections 789GDB(2) and 789GDB(3) are civil remedy provisions enforceable under Part 4-1 of the Fair Work Act, which provides access to the courts for (among other things) penalty and compensation orders to remedy contraventions.

***Division 3 – Jobkeeper enabling stand down***

*Section 789GDC (Jobkeeper enabling stand down)*

1.33 Sections 789GDC relates to Jobkeeper enabling standing down.

***Division 4 – Duties, location and days of work***

*Section 789GE (Duties of work)*

1.34 Sections 789GE relates to duties of work.

*Section 789GF (Location of work)*

1.35 Sections 789GF relates to location of work.

*Section 789GG (Days of work etc.)*

1.36 Sections 789GF relates to days of work.

***Division 5—Taking paid annual leave***

*Section 789GJ (Taking paid annual leave)*

1.37 Designated employment provisions may contain:

- restrictions on the type of work an employee may perform (for example, because of the employee's classification or qualification);

- limitations on when or where work may be performed, or requirements for minimum hours of work; or
- circumstances in which annual leave may be taken.

1.38 These conditions may prevent or restrict an employee's capacity to be available for necessary work in circumstances that arise because of the Coronavirus pandemic, or an employer's capacity to direct an employee to work in a different location in response to those circumstances.

1.39 If an employer qualifies for the JobKeeper scheme and is entitled to JobKeeper payments for a particular employee, Divisions 3 and 4 of Part 6-4C temporarily authorise that employer, despite any limitations in a designated employment provision, to:

- give a JobKeeper enabling stand down direction to work fewer days or hours to an employee who cannot usefully be employed for the employee's normal days or hours during the JobKeeper enabling stand down period because of business changes attributable to the Coronavirus pandemic or government initiatives (including Commonwealth, State or Territory Government initiatives) to slow Coronavirus transmission (section 789GDC), and
- give a direction to an employee about the nature of the employee's duties, within their skill and competency (section 789GE) or to perform duties at a place different from their normal place of work, including the employee's home (section 789GF).

1.40 These are *JobKeeper enabling directions* (definition in section 789GC refers). To be clear, a JobKeeper enabling direction can only be given to an employee by an employer who qualifies for the JobKeeper payment scheme in relation to that employee. While a JobKeeper enabling direction must inherently be given to an employee before the period to which it relates, and a JobKeeper payment is made in arrears, JobKeeper enabling directions are ultimately only valid if the JobKeeper payment is ultimately made to the employer in relation to that employee.

1.41 If an employer qualifies for the Jobkeeper scheme and is entitled to JobKeeper payments for a particular employee, Divisions 4 and 5 of Part 6-4C also enable that employer and employee, despite any limitations in a designated employment provision, to agree to the employee:

- working different days or at different times compared with the employee's ordinary days or times of work (section 789GG), or

- taking paid annual leave, including at half pay (section 789GJ).

1.42 The provisions would facilitate a range of flexible arrangements to support continuing business operation and the ongoing employment of employees.

1.43 A direction under sections 789GDC, 789GE or 789GF, or an agreement between an employer who qualifies for the Jobkeeper scheme and an employee under sections 789GG or 789GJ, have the effect of temporarily modifying employment rights and obligations to the extent specified in the direction or agreement. These arrangements can only be made in relation to the specific matters set out in sections 789GDC to 789GJ, and in accordance with other requirements set out in Part 6-4C.

1.44 Terms and conditions of an employee's employment beyond the scope of any JobKeeper enabling directions or agreements that have been given or agreed to by that employee will not be affected. If no such direction or agreement is made, existing rights and obligations (which may be derived from the Fair Work Act, a fair work instrument, contract of employment or transitional instrument) continue to apply.

1.45 In other words, an employee's terms and conditions of employment continue to apply, except to the limited extent modified by a JobKeeper enabling direction or agreement.

- For example, if an enterprise agreement permits an employer to change employee rosters following consultation, those terms continue to apply if no JobKeeper enabling direction is given about fewer days or hours of work. The employer would still be able to change rosters in accordance with the enterprise agreement.
- However, if the employer (who is eligible for the Jobkeeper scheme) gives a JobKeeper enabling direction that reduces an employee's hours of work via a JobKeeper enabling stand down direction, the direction applies despite any otherwise applicable enterprise agreement terms for the duration of the direction.

1.46 Part 6-4C does not modify terms and conditions of employment unless an employer who is eligible for the JobKeeper payment scheme makes a JobKeeper enabling direction or agreement. This is the case even where an employer qualifies for and makes payments to an employee under the Jobkeeper scheme but does not give a direction or make an agreement. That is:

- an employer can only make a JobKeeper enabling direction or agreement if they qualify for the JobKeeper scheme and are entitled to JobKeeper payments for the employee in

respect of whom the JobKeeper enabling direction or the agreement relates; but

- if no JobKeeper enabling direction or agreement is made, existing rights and obligations are unaffected.

*Section789GDC (Requirements for JobKeeper enabling stand down direction)*

1.47 Section 789GDC sets requirements for the giving of a *JobKeeper enabling stand down direction* by an employer (who qualifies for the JobKeeper scheme in relation to a particular employee) to that employee. A JobKeeper enabling stand down direction may require the employee not to work on particular days, or to work for a lesser period or for fewer hours than the employee would ordinarily work (including nil hours). A JobKeeper enabling stand down direction has effect despite a designated employment provision to the extent of any inconsistency.

1.48 The direction may be given if an employer qualifies for the JobKeeper scheme and is entitled to JobKeeper payments for the employee to whom the direction is given, and if:

- the employee cannot be usefully employed for their normal days or hours during the JobKeeper enabling stand down period because of changes to business attributable to the Coronavirus pandemic or government initiatives to slow Coronavirus transmission, and
- it can be implemented safely, having regard (without limitation) to the nature and spread of Coronavirus).

1.49 Changes to business could include, for example, less patronage and the closing of stores.

1.50 Subsection 789GDC(2) provides that while a JobKeeper enabling stand down direction is in place, the employer is still required to comply with:

- the wage condition in section 789GD;
- the minimum payment guarantee in section 789GDA; and
- the hourly rate of pay guarantee in section 789GDB;

but is not otherwise required to make payments to the employee in respect of the JobKeeper enabling stand down period.

1.51 An employee does not have to comply with a JobKeeper enabling stand down direction if it is unreasonable in all the circumstances (section 789GK).

**Example 1.1**

Jo is employed as a waiter in Anna's restaurant. Anna's restaurant has reduced operations to takeaway only because of Coronavirus restrictions. Anna qualifies for the JobKeeper scheme in relation to Jo, and gives Jo a JobKeeper enabling stand down direction not to attend work for 4 weeks, compared to her usual roster of 40 hours per week.

Anna is required to ensure Jo is paid the appropriate value of JobKeeper payments ($3000) during the four week JobKeeper enabling stand down period (section 789GD, which contains the wage condition obligation).

**Example 1.2**

Rachel works as an administrator for a manufacturing business whose retail operations have moved online as a result of significantly reduced shopfront demand and a 30 per cent reduction in turnover, following the Coronavirus outbreak. Rachel's employer qualifies for the JobKeeper scheme in relation to Rachel and gives her a JobKeeper enabling stand down direction under section 789GDA that reduces her ordinary hours of work from 38 to 32 hours per week. Rachel's contractual base pay rate is $30 per hour, which cannot be reduced for her hours of work, regardless of how many hours she is directed to work (section 789GDB, which contains the hourly rate of pay guarantee).

As a result of the JobKeeper enabling stand down direction reducing her hours, Rachel's fortnightly pay has reduced from $2280 ($30/hr multiplied by 76 hours worked in a fortnight) to $1920 ($30/hr multiplied by 64 hours worked in a fortnight).

Rachel must be paid for hours she worked, and as her reduced fortnightly pay is still higher than the value of the fortnightly JobKeeper payment ($1500) she must be paid that higher amount (section 789GDA, which contains the minimum payment guarantee).

However, under the JobKeeper scheme, Rachel's employer can apply the value of the JobKeeper payment towards her fortnightly pay.

1.52 A jobKeeper enabling stand down direction does not apply while an employee is taking paid or unpaid leave authorised by the employer (for example, annual leave), or is otherwise authorised to be absent (for example, on a public holiday).

*Section 789GE (Requirements for duties of work direction)*

1.53 Section 789GE sets requirements for an employer (who qualifies for the JobKeeper scheme in relation to a particular employee) to be able to direct that employee during a period to perform any duties within their skill and competency. A direction relating to duties of work has effect despite a designated employment provision to the extent of any inconsistency.

1.54 The direction may be given if an employer qualifies for the JobKeeper scheme and is entitled to JobKeeper payments for an employee, and if:

- the duties are safe (having regard, without limitation, to the nature and spread of Coronavirus);
- the employee is licensed and qualified to perform the duties (if a licence or qualification is necessary); and
- the duties are reasonably within scope of the employer's business operations.

1.55 An employee does not have to comply with a direction to change duties of work if it is unreasonable in all the circumstances (section 789GK).

**Example 1.3**

Ameisa operates a warehouse in NSW. The Storage Services and Wholesale Award 2010 applies to the employees of the warehouse, including Meera. As a storeworker grade 4, Meera generally acts in a leading hand capacity, coordinating the work of other storeworkers, performs liaison duties including with customers, and controlling inventory.

Ameisa's business is affected by the Coronavirus pandemic and qualifies for the JobKeeper scheme. Given the downturn in Ameisa's business operations, Meera is not required to perform her usual duties in respect of customer liaison. In order to keep Meera connected to employment during the pandemic, rather than reducing Meera's hours, Ameisa gives Meera a JobKeeper enabling direction that changes Meera's usual duties and enables her to be retain her regularly rostered hours, albeit in other duties.

Ameisa wants Meera to drive a forklift in the warehouse. Because the duties can be performed with appropriate social distancing and in a way that is safe with respect to the nature and spread of Coronavirus, reasonably within the scope of Ameisa's business operations, and Meera holds a current high risk work licence to operate a forklift (class LO), Ameisa is able to give a JobKeeper enabling direction authorised by s 789GE to drive the forklift.

While Meera's duties have been modified by the JobKeeper enabling direction, the other terms and conditions relating to her employment, such as the days and hours she works, are unchanged.

*Section 789GF (Requirements for location direction)*

1.56 Section 789GF sets requirements for an employer (who qualifies for the JobKeeper scheme in relation to a particular employee) to be able to direct that employee during a period to perform duties at a place (including the employee's home) that is different from the employee's

normal workplace. A direction relating to location of work has effect despite a designated employment provision to the extent of any inconsistency.

1.57 The direction may be given if an employer qualifies for the JobKeeper scheme and is entitled to JobKeeper payments for an employee, and if:

- the place is suitable for the employee's duties;
- if the place is not the employee's home – it does not require the employee to travel a distance that is unreasonable in all the circumstances (including those surrounding the Coronavirus pandemic); and
- performance of the employee's duties at the place is safe, having regard (without limitation) to the nature and spread of Coronavirus, and is reasonably within scope of the employer's business operations.

1.58 A direction to change work location does not apply to an employee if it is unreasonable in all the circumstances, including where it impacts on caring responsibilities of an employee (section 789GK).

*Section 789GG (Requirements for days / time of work agreement)*

1.59 Section 789GG facilitates an employer who qualifies for the JobKeeper payment scheme in relation to a particular employee and that employee to be able to agree (despite any designated employment provision) to the employee performing work on different days or at different times during a period, compared with the employee's ordinary days or times of work.

1.60 The agreement is authorised if an employer qualifies for the JobKeeper scheme and is entitled to JobKeeper payments for the employee, and if:

- performance of the duties on different days or at different times is safe, having regard (without limitation) to the nature and spread of Coronavirus and reasonably within the scope of the employer's business operations, and
- the agreement does not reduce the employee's number of hours of work compared with the employee's ordinary hours of work (reduced hours can only be effected under section 789GDC).

1.61 An employee must consider and must not unreasonably refuse the employer's request for agreement to the changed arrangements. An agreement to work different days or times would need to be agreed by an employee, but in the absence of agreement the FWC could settle a dispute about this by arbitration (Division 10).

1.62 The circumstances of particular workplaces would inform what is reasonable in this area. For example, an employee who usually works weekends could reasonably be required to work on weekdays in a situation where their employer's business can no longer trade on weekends as a result of the Coronavirus pandemic.

1.63 An employee's ordinary hours of work during the period to which an agreement under subsection (2) relates are the hours of work provided for in that agreement.

*Section 789GJ (Taking paid annual leave)*

1.64 Section 789GJ facilitates an employee (whose employer qualifies for the JobKeeper payment scheme in relation to them) to consider their employer's request to take paid annual leave and to agree (despite any designated employment provision) to take annual leave at half pay.

1.65 If an employer qualifies for the JobKeeper scheme and is entitled to JobKeeper payments for an employee, an employee must consider (and must not unreasonably refuse) their employer's request to take annual leave, provided that the leave arrangement would not result in reducing the employee's leave balance to fewer than two weeks. If the employee does not agree to the request, the FWC could settle a dispute about this by arbitration (see Division 10).

1.66 If an employer qualifies for the JobKeeper scheme and is entitled to JobKeeper payments for an employee, the employer and employee can also agree (despite any designated employment provision) to the employee taking twice as much annual leave at half the employee's rate of pay for a period.

***Division 6—Rules relating to JobKeeper enabling directions***

*Section 789GK (Reasonableness), section 789GL (Continuing the employment of employees), section 789GM (Consultation), section 789GN (Form of direction), section 789GP (Duration) and section 789GQ (Compliance)*

1.67 Division 6 provides general rules for an employer's JobKeeper enabling direction to an employee:

- Any direction must not be unreasonable in all the circumstances (this could, for example, depend on its impact on an employee's caring responsibilities). If a direction is unreasonable in all the circumstances, it does not apply to an employee (section 789GK).
- In addition to the reasonableness test in section 789GK, in the case of a direction for changed duties (s 789GE) or work

location (s 789GF), the employer has information to support a reasonable belief the direction is necessary to continue the employment of one or more employees (and in this context it is immaterial that the employer could have given a similar direction to another employee) (section 789GL).

- The employer must give the employee at least three days written notice of the intention to give a direction or lesser period by genuine agreement (although this does not apply if the employer previously provided such notice of the direction and considered any views of the employee in that context), consult the employee or the employee's representative about it, and keep a written record of the consultation (section 789GM).
- The direction must be in writing (this could include by electronic means). The regulations may prescribe a form for the direction (section 789GN).
- The direction continues in effect until withdrawn or revoked by the employer, or replaced by a new direction given to the employee – this is subject to any FWC order under Division 11 and to cessation of the direction at the start of 28 September 2020 (section 789GP).
- An employee given a JobKeeper enabling direction by their employer must comply with the direction (section 789GQ).

***Divisions 7 (Service) and Division 8 (Accrual rules)***

*Section 789GR (Service) and section 789GS (Accrual rules)*

1.68 Sections 789GR and 789GS provide that:

- during a period when an employee is subject to a JobKeeper enabling direction, the period counts as service (this is in addition to the effect of section 22 of the Fair Work Act, which provides general rules about service) (section 789GR);
- an employee who is subject to a JobKeeper enabling stand down direction under section 789GDC accrues leave entitlements as if the direction had not been given, and any entitlements to redundancy pay and payment in lieu of notice of termination are to be calculated as if the direction had not been given (subsections 789GS(1) and (2)); and
- an employee who takes annual leave at half pay in accordance with an agreement under subsection 789GJ(2) accrues leave entitlements as if the direction had not been given, and any entitlements to redundancy pay and payment

in lieu of notice of termination are to be calculated as if the direction had not been given (subsections 789GS(3) and (4)).

1.69 Periods to which agreements made under sections 789GG or 789GJ apply will count for service and accrual of entitlements as they normally would under section 22 of the Fair Work Act.

### *Division 9 - Employee requests for secondary employment, training etc.*

*Section 789GU (Employee requests for secondary employment, training)*

1.70 An employee could ask their employer who qualifies for the JobKeeper payment scheme in a range of circumstances for permission to engage in reasonable secondary employment, training or professional development. If an employee who is subject to a JobKeeper enabling stand down direction under section 789GDC makes such a request, section 789GU requires the employer to consider and not unreasonably refuse such requests.

1.71 Section 789GU is a civil remedy provision enforceable under Part 4-1 of the Fair Work Act, which provides access to the courts for (among other things) penalty and compensation orders to remedy contraventions.

### *Division 10 – Dealing with disputes*

*Section 789GV (FWC may deal with a dispute about the operation of this Part) and section 789GW (Contravening an FWC order dealing with a dispute about the operation of this Part)*

1.72 Division 10 enables the FWC to settle disputes about the operation of Part 6-4C. Section 789GV authorises the FWC to deal with a dispute by arbitration (in addition to its powers under section 595 to deal with disputes by mediation or conciliation etc.), and permits it to make:

- an order it considers desirable to give effect to a JobKeeper enabling direction;
- an order setting aside, or substituting, a JobKeeper enabling direction; or
- any other order it considers appropriate.

1.73 Consistent with other provisions that authorise the FWC to deal with disputes by arbitration (such as section 526 in relation to disputes about stand down), the FWC must take into account fairness between the parties to the dispute.

1.74 An application to the FWC to deal with a dispute may be made by an employee or an employee organisation, or an employer or an employer organisation.

1.75 Section 789GW provides that a person must not contravene a term of an FWC order dealing with a dispute about the operation of Part 6-4C. Section 789GW is a civil remedy provision enforceable under Part 4-1 of the Fair Work Act.

1.76 Item 3, Part 1 of Schedule 1 to the Bill amends subsection 675(2) of the Fair Work Act to extend the current list of FWC orders that do not attract liability for an offence to include FWC orders under new Part 6-4C.

***Division 11 – Exclusions***

*Section 798GX (Exclusions)*

1.77 This provision is a limited regulation making power. It only enables the Minister, by legislative instrument, to exclude one or more specified employers from the operation of any or all provisions that authorise a JobKeeper enabling direction or agreement (that is, sections 789GDC, 789GE to 789GJ inclusive). This might be done in circumstances where (for example) an employer contravenes a civil remedy provision.

***Division 12 – Protections***

*Section 789GXA (Misuse of JobKeeper enabling direction)*

1.78 Section 789GXA prohibits an employer from purporting to give a JobKeeper enabling direction if the direction is not authorised by Part 6-4C and the employer knows that the direction is not authorised.

1.79 Section 789GXA is a civil remedy provision enforceable under Part 4-1 of the Fair Work Act, and carries a maximum penalty of 600 penalty units.

*Section 789GY (Protection of workplace rights)*

1.80 Section 789GY makes clear, for avoidance of doubt, that an employee's:

- benefit arising because of their employer's obligation under section 789GD to satisfy the wage condition;
- agreement or disagreement to perform duties on different days or at different times in accordance with subsection 789GG(2);
- agreement or disagreement to take paid annual leave in accordance with a request subsection under

subsection 789GJ(1), or to take annual leave at half pay in accordance under subsection 789GJ(2); and

- request in relation to secondary employment, training under section 789GU;

are workplace rights within the meaning of Part 3-1 (general protections) of the Fair Work Act. Adverse action cannot be taken against an employee because of the employee's workplace rights (see sections 340-342).

1.81 Coercion and false or misleading statements in relation to workplace rights are also prohibited (see sections 343 and 345).

*Section 789GZ (Relationship with other laws)*

1.82 Section 789GZ renders Part 6-4C subject to:

- Division 2 of Part 2-9 (payment of wages etc);
- Part 3-2 (unfair dismissal);
- Part 3-1 (general protections) and section 772 (employment not to be terminated on certain grounds) of the Fair Work Act;
- a Commonwealth, State or Territory anti-discrimination law;
- a Commonwealth, State or Territory law that deals with health and safety obligations of employers or employees, or with workers' compensation; and
- a person's right to be represented, or collectively represented, by an employee organisation or employer organisation.

*Section 789GZA (Redundancy)*

1.83 Section 789GZA provides that the giving of a JobKeeper enabling direction does not amount to a redundancy.

***Division 13 – Review of this Part***

*Section 789GZB (Review of this Part)*

1.84 Section 789GZB requires the Minister to cause an independent review to be conducted of the operation of Part 6-4C.

1.85 The review must start on or before 28 July 2020 and be completed and delivered to the Minister on or before 8 September 2020. These dates may be modified by regulation.

1.86 A copy of the review report must be tabled in each House of Parliament within five sitting days of that House after the report is given to the Minister.

## Part 2 —Repeal of the core provisions of Part 6-4C of the Fair Work Act 2009 etc.

***Fair Work Act 2009***

1.87 Items 6, 7 and 9 of Schedule 1, Part 2 repeal:

- amendments made by Schedule 1, Part 1 to subsection 539(2);
- sections 789GA and 789GB; and
- Divisions 2, 3, 4, 5, 6, 9 and 11 of Part 6-4C;

consistent with the temporary nature of these changes.

1.88 The repeals occur at the start of 28 September 2020.

1.89 Item 8 of Schedule 1, Part 2 inserts 'repealed' in front of 'section 789GC'.

***Transitional – JobKeeper enabling directions etc.***

1.90 This item makes clear, for avoidance of doubt, that the repeal of relevant Divisions of Part 6-4C means that no further JobKeeper enabling directions can be given, and any JobKeeper enabling directions in effect at the time of the repeal cease to have effect from the repeal time. This means that once the substantive provisions are repealed, and any JobKeeper enabling directions or agreements made under these provision cease, employees' terms and conditions will revert back to what they were without the JobKeeper enabling directions or agreements in place.

## Application and Transitional Provisions

1.91 Schedule 1 to this Bill will commence on the day after the day on which this Bill receives Royal Assent.

# *Chapter 2*
# *Coronavirus Economic Response Package (Payments and Benefits) Bill 2020 and consequential amendments*

## Outline of chapter

2.1 The Australian Government is acting decisively in the national interest to address the significant economic consequences of the Coronavirus, without a permanent or structural impact on the budget balance.

2.2 The Payments and Benefits Bill is a key part of the Commonwealth response to the potential national emergency arising from the spread of the Coronavirus.

2.3 The Payments and Benefits Bill establishes a framework for Coronavirus economic response payments. Under the framework, the Treasurer will be able to make rules to provide for new payments administered by the Commissioner. This allows for flexibility of the payment arrangements and ensures the payments can be quickly introduced and revised to appropriately respond to the impacts of the Coronavirus.

2.4 The design of the framework recognises that the Commissioner, through existing arrangements, makes payments to and receives payments from taxpayers as part of the administration of the tax law. Therefore, the Commissioner is well placed to administer payment programs to individuals and businesses, but requires specific legislative authority to facilitate this.

2.5 The payments under the framework are intended to support entities that are directly or indirectly affected by the Coronavirus. The JobKeeper Payments announced on 30 March 2020 are intended to be delivered under this payment framework.

2.6 The payments may only be made by the Commissioner from the day of commencement and must relate to the period from 1 March 2020 until 31 December 2020 (inclusive).

## Context of amendments

2.7 The economic impacts of the Coronavirus pose significant challenges for many businesses – many of which are struggling to retain their employees.

2.8 Under the JobKeeper Payment, businesses significantly impacted by the Coronavirus outbreak will be able to access a subsidy from the Government to continue paying their employees. This assistance will help businesses to keep people in their jobs and re-start when the crisis is over. For employees, this means they can keep their job and earn an income – even if their hours have been cut.

2.9 The JobKeeper Payment is a temporary scheme open to businesses impacted by the Coronavirus. The JobKeeper Payment will also be available to the self-employed. The Government will provide $1,500 per fortnight per employee for up to six months. The JobKeeper Payment will support employers to maintain their connection to their employees. These connections will enable business to reactivate their operations quickly – without having to rehire staff – when the crisis is over.

## Summary of new law

2.10 The Payments and Benefits Bill establishes a framework for the Treasurer to make rules which provide for the Commissioner to make payments to eligible entities. Under this payment framework, the Commissioner has general administration of these payments.

2.11 The framework also sets out:

- the manner in which payments are made;
- rules for overpayments (including the application of interest);
- the process for the review of decisions about the payments; and
- the applicable record-keeping requirements.

2.12 Details of eligibility for particular payments as well as the amount of payments and the time when they are to be paid are to be set out in the rules made by the Treasurer. This allows for flexibility of the arrangements to introduce and modify payments to appropriately respond to the impacts of the Coronavirus.

2.13 The payments may only be made by the Commissioner from the day of commencement and only for the period from 1 March 2020 until 31 December 2020 (inclusive).

2.14 Schedule 2 to this Bill makes a number of consequential amendments to facilitate the Payments and Benefits Bill, including:

- technical amendments to the ITAA 1936, ITAA 1997, the Social Security Act and the *Veterans' Entitlement Act 1986* to ensure a consistent treatment of the Coronavirus economic response payments;
- amendments of a machinery nature to the *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020*;
- providing a power in the Coronavirus Omnibus Act for the Minister for Families and Social Services to determine modifications to Part 5 of the SSAA. The modifications to the SSAA must be in connection with payments under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*, including applications for such payments; and
- amendments to the PPL Act to address relevant changes to paid parental leave as a result of the Coronavirus economic response payments.

## Comparison of key features of new law and current law

| *New law* | *Current law* |
|---|---|
| The Payments and Benefits Bill establishes a framework for the Treasurer to make rules to provide for Coronavirus economic response payments to be made by the Commissioner. | No equivalent. |

## Detailed explanation of new law

2.15 The Payments and Benefits Bill is a key part of the Commonwealth response to the potential national emergency arising from the spread of the Coronavirus.

2.16 The object of the Payments and Benefits Bill is to establish a framework for the provision of financial support to entities that are directly or indirectly affected by the Coronavirus.
***[Clause 3 of the Payments and Benefits Bill]***

2.17 The framework applies to Australia within the meaning in section 960-505 of the ITAA 1997. This definition includes Australia's external Territories. ***[Clause 4 of the Payments and Benefits Bill]***

2.18 Under the framework, the Commissioner has general administration over the Act established by the Payments and Benefits Bill and of payments established under the rules made by the Treasurer. As a consequence, the general confidentiality provisions that apply to the Commissioner in relation to taxpayer information (under Division 355 of the TAA 1953) also apply in relation to information under this framework. ***[Clause 5 of the Payments and Benefits Bill]***

2.19 The Payments and Benefits Bill includes a number of definitions, including general definitions and specific definitions relating to schemes. The following definitions apply generally:

- The term *approved form* is used. This term has the meaning given in section 388-50 in Schedule 1 to the TAA 1953, and means, broadly, a document approved in writing by the Commissioner for a particular purpose provided in the manner and with such information as the Commissioner may require.
- The term *Australia* is used. This term is given the same meaning used in section 960-505 of the ITAA 1997. This definition includes Australia's external Territories.
- The term *Commissioner* is used. This refers to the Commissioner of Taxation.
- The term *Coronavirus economic response payment* is used. This refers to all payments administered under the rules of the payment framework established by the Payments and Benefits Bill.
- The term *entity* is used. This term is given the meaning used in the ITAA 1997. This is a broad definition that covers generally any individual, body corporate, body politic, partnership, trust, superannuation fund, approved deposit fund and unincorporated association or body of persons.
- The term *general interest charge* is used. This term refers to the charges worked out under Part IIA of the TAA 1953.
- The terms *income tax return* and *income year* are used. These terms are given the meaning used in section 995-1 of the ITAA 1997.

- The term *prescribed period* is used. This term describes the period to which Coronavirus economic response payments under the framework must relate. The prescribed period is the period between 1 March 2020 and 31 December 2020 (inclusive).
- The term *this Act* is used. This term refers to both:
  - the Act established by the Payments and Benefits Bill; and
  - the rules made under the framework.

***[Clause 6 of the Payments and Benefits Bill]***

2.20 This framework is intended to deliver the JobKeeper Payments, announced on 30 March 2020. These payments will support businesses to keep more Australian workers in jobs through the course of the Coronavirus outbreak. These payments are aimed at maintaining the connection between employers and employees. This will allow businesses to recommence their operations quickly and productively.

2.21 Rules will be made by Treasurer to establish the JobKeeper Payment, including setting out:

- which employers are eligible for the payment;
- the employee to which the payments relate;
- the amount payable and the timing of payments; and
- the obligations for recipients of the JobKeeper Payment.

## The Coronavirus economic response payment framework

2.22 Under the payment framework set out in the Payments and Benefits Bill, the Treasurer may make rules that provide for payments to be made by the Commissioner. The rules may also provide for the establishment of arrangements dealing with matters relating to such payments and related administrative matters (such as obligations to notify the Commissioner or to hold particular records).
***[Clause 7 of the Payments and Benefits Bill]***

2.23 The matters the rules may deal with include, but are not limited to, the following:

- the eligibility criteria for a payment;
- if or how an application for a payment may or must be made;
- whether a payment is to be paid in instalments or as a lump sum;
- entitlement to a payment or an instalment of a payment;

- the amount of a payment (including the amount of any instalments);
- when a payment or an instalment of a payment is payable;
- conditions applying to a payment or an instalment of a payment;
- providing information or notices; and
- the rights, obligations and liabilities under the payment scheme of payment recipients, and other entities that directly benefit from payments or in relation to which a payment is made.

2.24 Effectively, the rules may establish particular payments programs and deal with matters that are specific to the payment programs, such as entitlement, amount and timing. Any payments must relate to the prescribed period – that is, the period from 1 March 2020 to 31 December 2020. Although earlier events may affect payment entitlements, payments can only be made prospectively after the commencement of both the Bill and the rules providing for the payment

***Method of payment***

2.25 Payments under the framework will generally be paid to the entity by the Commissioner by crediting the amount of the payment to the financial institution account nominated under subsection 8AAZLH(2) of the TAA 1953 (where tax refunds are generally administered). If no such account has been nominated, payments will generally be made to the financial institution account nominated in the entity's most recent income tax return. ***[Clause 8 of the Payments and Benefits Bill]***

2.26 The Commissioner may also direct that a payment is to be made to an entity in another way, including by crediting an amount to the running balance account of the entity. Circumstances where the Commissioner may choose to direct that the payment is made as a credit within the meaning of section 8AAZA of the TAA 1953 include where the Commissioner wishes to delay the payment to verify the entitlement to the payment under section 8AAZLGA of the TAA 1953 (which allows the Commissioner to delay payments while verifying information). ***[Subclause 8(2) of the Payments and Benefits Bill]***

2.27 Where an account has not been nominated, and the Commissioner has not directed the payment to be made in another way, the Commissioner is not obliged to make the payment until:

- an account is so nominated; or
- the Commissioner directs that the payment is to be made in another way.

2.28 This ensures that payments can be made through existing processes, minimising administrative and compliance costs. These payments will not be offset against tax liabilities or other amounts owing to the Commissioner, unless the Commissioner directs that a payment is to be made in a manner subject to offsetting.

***Where there is overpayment***

2.29 Where the Commissioner has overpaid an entity a payment under the framework, the entity must repay the overpaid amount to the Commissioner. This can arise where:

- the entity is not entitled to the whole or part of a payment that is made; or
- the entity is paid more than the correct amount.

***[Clause 9 of the Payments and Benefits Bill]***

2.30 However, the requirement to repay overpayments does not apply if the Commissioner makes a written determination to this effect. This ensures that the Commissioner has flexibility to address issues that might otherwise arise where entities may have made an honest mistake and not retained any personal benefit from a payment they have received.

2.31 Where there has been an overpayment which the entity is required to repay, the entity is liable to general interest charges for the overpaid amounts that have not been repaid. These general interest charges apply automatically. ***[Clause 10 of the Payments and Benefits Bill]***

2.32 The Commissioner has existing powers to remit general interest charges in particular circumstances. The overpayment and the interest charge are also tax-related liabilities and are subject to the administrative regime under Part 4-15 in Schedule 1 to the TAA 1953, including the discretions to remit amounts under that regime.

*Joint and several liability to repay overpayment*

2.33 The Payments and Benefits Bill also provides that in some circumstances, another entity may be jointly and severally liable for an overpayment (and any associated interest) with the entity that received the payment. ***[Clause 11 of the Payments and Benefits Bill]***

2.34 Where an entity is liable to repay an overpaid amount, and if that payment was made in reliance on information provided by another entity, then the Commissioner may determine that both the entity and the other entity are jointly and severally liable to repay the amount. The Commissioner may only make such a determination if the Commissioner is satisfied that:

- the overpayment was a result of the entity acting in reasonable reliance on written information provided by the other entity in the approved form;
- the information was materially false or misleading;
- the other entity did not take reasonable care in making the statement;
- the other entity received a direct benefit from the payment; and
- the Commissioner is satisfied that joint and several liability is reasonable in the circumstances.

2.35 These provisions recognise that some payments made under the payment framework may be made to the ultimate benefit of another entity (such as an employee) and may rely on the provision of accurate and truthful information by that other entity. In cases where an entity makes a careless or deliberately false statement and receives a direct benefit, this allows recovery of the payment from the other entity in addition to the entity who received the payment.

2.36 Similarly, the Commissioner may determine that an entity and another entity are jointly and severally liable to make a repayment if the Commissioner is satisfied that:

- the entity is liable to repay an overpaid amount;
- the overpayment was because of the fraud of another entity; and
- it is reasonable for the other entity to be jointly and severally liable.

2.37 These powers allow the Commissioner to recover amounts obtained by the Commonwealth as a result of fraud, even where the entity that undertakes the fraud may do so as part of a scheme under which the direct payments go to another entity.

2.38 An entity that engages in fraud about payments made under the framework is also potentially liable for a wider range of administrative and criminal sanctions under the tax law and general criminal law, some of which are set out in the table below.

| Provision | Penalty |
|---|---|
| Section 284-75 in Schedule 1 to the TAA 1953 – administrative penalties for false and misleading statements | A financial penalty of up to 75 per cent of the amount of any overpayment |
| Section 8C of the TAA 1953 – | Imprisonment for up to 12 months |

| Provision | Penalty |
|---|---|
| criminal offence for a failure to comply with requirements under the taxation law | and a fine of up to 50 penalty units (250 penalty units for corporate entities) |
| Section 8K and 8N of the TAA 1953 – criminal offence for making false or misleading statements to taxation officers | Imprisonment for up to 12 months and a fine of up to 50 penalty units (250 penalty units for corporate entities) |
| Section 134.2 of the Criminal Code – obtaining financial advantage by deception | Imprisonment for up to 10 years |
| Section 135.2 of the Criminal Code – obtaining financial advantage | Imprisonment for up to 12 months |
| Section 135.4 of the Criminal Code – conspiracy to defraud | Imprisonment for up to 10 years |

## Review of decisions made by the Commissioner

2.39 The rules made by the Treasurer may specify:

- if and when a decision is taken to be made by the Commissioner; and
- when a decision that is made is taken to have been given by the Commissioner.

***[Clause 12 of the Payments and Benefits Bill]***

2.40 In some cases, the rules may provide for payments to be made without requiring applications by entities or notice by the Commissioner. This provision ensures that, in such cases, the rules may set out when a decision is taken to be made and notice is taken to be given. However, if the rules do not provide that actual notice of a decision must be given, or that notice of the decision is taken to be given at a particular time, then, if the decision is one to which an entity could object, notice of the decision is taken to have been given at the time of the decision for the purposes of section 14ZW of the TAA 1953.

2.41 The provisions ensure that the objection process under Part IVC of the TAA 1953 can operate appropriately for such payments, allowing appropriate review.

***Right to review***

2.42 Review under Part IVC of the TAA 1953 applies to decisions made by the Commissioner under the framework, including:

- whether an entity is entitled to a Coronavirus economic response payment for a period (whether an entity's

entitlements are altered as a result of a contrived scheme (see paragraphs 2.61 to 2.67);

- whether an entity is entitled to a particular amount of a Coronavirus economic response payment for a period;
- whether an entity is relieved from repaying the overpayment amount (see paragraph 2.30);
- whether another entity (that is not the recipient of a payment) is jointly and severally liable to repay an overpayment amount; and
- whether an entity is exempt from record keeping requirements (see paragraph 2.50).

***[Clause 13 of the Payments and Benefits Bill]***

2.43 This allows affected entities to object to and seek review of decisions about payments (including review by the Administrative Appeals Tribunal), consistent with the general review framework applying to decisions about liabilities and entitlements under laws administered by the Commissioner.

## Record keeping requirements

2.44 The Payments and Benefits Bill requires that entities create and retain records substantiating information provided to the Commissioner in relation to payments unless the Commissioner provides otherwise.

2.45 There are record keeping requirements both prior to payment and post-payment. ***[Clause 14 of the Payments and Benefits Bill]***

2.46 Requirements for the keeping of records prior to payment are referred to as the pre-payment record keeping requirements. If an entity does not satisfy the pre-payment record keeping requirements then, despite any other eligibility criteria or provisions in the rules, an entity is not entitled to a Coronavirus economic response payment.

2.47 If an entity does not meet the post-payment record keeping requirements, the entity is taken to have never been entitled to the payment.

2.48 Where an entity gives the Commissioner a statement in an approved form to the effect that they will undertake to comply with the record keeping requirements, the Commissioner may assume that there is compliance with the record keeping requirements. This assumption is to facilitate the Commissioner's decision regarding the entity's entitlement to a payment.

2.49 However, if the record keeping requirements are in fact not met, the Commissioner may, taking into account available evidence:

- revoke the decision about the entity's entitlement to a payment so that the entity is no longer entitled to a payment; or
- vary the decision to pay the entity a reduced amount.

2.50 Despite the general record-keeping obligations, the Commissioner has the power to make a determination that an entity is not required to comply with a record keeping requirement. This will allow the Commissioner to reduce compliance costs in situations where records are not required given the circumstances of the entity and the payment.

***Record keeping requirements prior to payment – pre-payment record keeping***

2.51 To satisfy the pre-payment record keeping obligations, the entity must keep records to substantiate all information provided in their application. These records must be either kept in English, or are readily accessible and easily convertible to English.
***[Clause 15 of the Payments and Benefits Bill]***

2.52 The Commissioner may determine how records should be kept for the purposes of these pre-payment record keeping requirements. Where an entity complies with this determination, the entity is taken to have satisfied the pre-payment record keeping requirements. Under this determination, the Commissioner may specify:

- the kinds of records that must be kept; and
- the manner in which they must be kept.

2.53 The Commissioner's determination about pre-payment record keeping is a legislative instrument.

***Post-payment record keeping requirements***

2.54 To satisfy the post-payment record keeping obligations, the entity must:

- if record keeping provisions are made in the rules by the Treasurer – retain records according to the rules;
- retain all records for five years after the payment was made;
- specifically retain their pre-payment records for five years after the payment was made; and
- comply with a written notice from the Commissioner to produce their records (when asked to do so).

***[Clause 16 of the Payments and Benefits Bill]***

2.55 The Commissioner may make a determination about the types of records to keep and the manner in which to keep them for the purposes of the obligation on an entity to retain records under the rules. Where such a determination has been made, an entity is taken to have satisfied the obligation to retain records according to the rules if they comply with the Commissioner's determination.

2.56 The records must be kept by the entity in English, or be readily accessible and easily convertible to English.

2.57 A written notice from the Commissioner to produce records must allow the entity at least 28 days to comply. A longer period may be given by the Commissioner. ***[Clause 17 of the Payments and Benefits Bill]***

2.58 However, unlike a failure to comply with taxation notices to produce records, a failure to comply with the notice to produce records under the payment framework is not a criminal offence.

2.59 An entity may stop retaining records if the Commissioner notifies the entity that the entity is not required to do so.

***Lost or destroyed records***

2.60 If records that are required to be kept are lost or destroyed, then:

- if a copy of the original record that is lost or destroyed exists – the copy is taken to be the original; or
- if the original record is lost or destroyed but the Commissioner is satisfied that the entity took reasonable precautions to prevent the loss or destruction of the record – the entity's entitlement to a payment under the framework is not affected by the failure to produce the document.

***[Clause 18 of the Payments and Benefits Bill]***

## Contrived schemes and consequences

2.61 If one or more entities (these entities are referred to as participants) enter into or carry out a scheme for the sole or dominant purpose of obtaining a Coronavirus economic response payment or an increased amount of a Coronavirus economic response payment for an entity (whether or not a participant), then the Commissioner may make a determination regarding the scheme.
***[Clause 18 of the Payments and Benefits Bill]***

2.62 The Commissioner may determine that the entity was never entitled to a payment or the amount to which the entity was entitled was always the amount specified by the Commissioner in the determination. Under the payment framework, the term *scheme* is given the meaning used in the GST Act. Under subsection 165-10(2) of the GST Act, a scheme includes a broad range of arrangements.

2.63 The Commissioner may make the determination by having regard to:

- the manner in which the scheme was entered into or carried out;
- the form and substance of the scheme;
- the time at which the scheme was entered into and the length of the period during which the scheme was carried out;
- the result in relation to the operation of the Coronavirus payment framework that, but for this provision, would be achieved by the scheme;
- any change in the financial position of the recipient that has resulted, will result, or may reasonably be expected to result, from the scheme;
- any change in the financial position of any entity that has, or has had, any connection (whether of a business, family or other nature) with the recipient, being a change that has resulted, will result or may reasonably be expected to result, from the scheme;
- any other consequence for the recipient, or for any connected person, of the scheme having been entered into or carried out; and
- the nature of any connection (whether of a business, family or other nature) between the recipient and any connected person.

2.64 These rules protect the integrity of the payment framework. They ensure that entities that enter into contrived schemes do not obtain a payment (including an increased amount of payment) they would otherwise not be entitled to.

2.65 The scheme does not need to be criminal in nature. For example, the Commissioner could make a determination to deny an entity an assistance payment, such as the JobKeeper Payment, if the entity has deliberately altered its business arrangements to reduce its turnover in order to allow the entity to meet the turnover requirements to receive the payment.

2.66 The Payments and Benefits Bill provides that a determination of the Commissioner in relation to a scheme is not a legislative instrument. This provision is purely declaratory, as the instrument, being an administrative decision relating to a single entity, is not legislative in character and would not otherwise have been a legislative instrument.

2.67 In addition to the scheme provisions, there is an extensive existing framework of penalties in the Criminal Code and the TAA 1953 that can apply in circumstances where individuals and entities make false, misleading or reckless statements to the Commonwealth or engage in arrangements or assist others to defraud the Commonwealth.

## The rules under the framework

2.68 The rules made by the Treasurer for the purposes of the payment framework are a legislative instrument.
***[Clause 19 of the Payments and Benefits Bill]***

2.69 The power to make these rules is provided to the Treasurer because they allow for a flexible way to provide for new payments by the Commissioner. This allows the framework to be modified and updated so that the payments respond appropriately to rapidly changing circumstances. This flexibility and responsiveness is necessary in order to effectively address the impacts of the Coronavirus in a situation of considerable uncertainty.

2.70 The use of rules rather than regulations enhances flexibility and responsiveness, which is central to achieving the purpose of the Payments and Benefits Bill to provide financial support to address the economic impacts of the Coronavirus. It is also consistent with the general approach of the Office of Parliamentary Counsel as set out in Drafting Direction No. 3.8.

2.71 Any rules made by the Treasurer using this power are subject to the full process of Parliamentary scrutiny including disallowance as set out in the *Legislation Act 2003*.

2.72 Consistent with general principles for legislative instruments, these rules may not:

- create a criminal office or civil penalty;
- provide for powers of arrest, detention, entry, search or seizure;
- impose a tax;
- set an amount of appropriation from the Consolidated Revenue Fund; or
- directly amend the text of the primary Act.

2.73 The rules may apply differently for different classes of entities, or for different kinds of payments.

2.74 The rules may also:

- sub-delegate a power to the Commissioner to make an administrative or legislative instrument for the purposes of the rules; and
- incorporate other instruments or documents by disregarding the rule in subsection 14(2) of the *Legislation Act 2003*.

2.75 It is anticipated that there may be administrative matters for which it may be appropriate for the Commissioner to make general provision by making legislative instruments (for example, exempting a class of entities from reporting requirements) or for the rules to operate by reference to other instruments or documents (such as international treaties or World Health Organisation documents).

2.76 Together these provisions enable the rules to remain responsive and appropriate to the rapidly evolving climate. The legislative instrument made by the Commissioner can be used to supplement the rules made by the Treasurer. This sub-delegation is intended to further promote the policy objectives of this measure and to ensure its responsiveness. Given that the Commissioner is administering the payments, the Commissioner is a suitable delegate with firsthand knowledge about how the administration of the payment framework can remain robust over time.

2.77 The collective use of these legislative instruments is necessary to allow the framework to achieve its policy outcome of quickly and more effectively supporting those impacted by the Coronavirus. They ensure that the law and the administration can remain robust and responsive, while giving a high degree of certainty to relevant entities by incorporating other documents that can be more easily updated outside of Parliamentary processes.

2.78 The Payments and Benefits Bill makes clear that the rules may prescribe matters required or permitted to be prescribed in these rules by other laws of the Commonwealth, such as is set out in the consequential amendments made in Schedule 2 to this Bill.

2.79 The Payments and Benefits Bill also makes clear that the provision of specific rules in framework set out on the Payments and Benefits Bill on matters such as record keeping does not prevent the rules from providing additional or supplementary requirements about those matters that may be appropriate in the context of particular payments.

## Consequential amendments

2.80 Schedule 2 to this Bill makes amendments to a number of Acts to implement measures to address the potential economic impacts of the Coronavirus.

2.81 For the Coronavirus payment framework measure, Schedule 2 to this Bill amends:

- the objects provision regarding the establishment of tax file numbers under of paragraph 202(s) of the ITAA 1936 to include for the purposes of the Coronavirus economic response payments.
- the list of exempt income provisions in section 11-15 of the ITAA 1997 to include certain payments received under the Coronavirus payment framework;
- the list of non-assessable non-exempt income provisions in section 11-55 of the ITAA 1997 to include certain payments received under the Coronavirus payment framework;
- Division 53 of the ITAA 1997 to provide that the payments received under the Coronavirus payment framework are exempt income where the rules specify that those payments are exempt income;
- Division 59 of the ITAA 1997 to provide that the payments received under the Coronavirus payment framework are non-assessable non-exempt income where the rules specify that those payments are non-assessable non-exempt income;
- the index of provisions dealing with liability to the general interest charge in subsection 8AAB(4) of the TAA 1953 to include the provision applying the general interest change to all wrong or overpaid payments received under the Coronavirus payment framework;

- the definition of credit in section 8AAZA of the TAA 1953 so that payments made under the framework are not automatically a credit for the purposes of the running balance account rules, ensuring that the payments are not automatically offset against tax liabilities;
- the provision for payments under the framework to be treated as credits where relevant by including section 8AAZAA of the TAA 1953;
- the list of exclusions in section 8WA of the TAA 1953 from which tax file numbers cannot be requested to also exclude tax file numbers quoted for the purposes of payments under the Coronavirus payment framework;
- the index of tax-related liabilities under other Acts administered by the Commissioner in subsection 250-10(2) to Schedule 1 to the TAA 1953 to include wrong or overpaid amounts received under the Coronavirus payment framework; and
- the Social Security Act and the *Veterans' Entitlement Act 1986* to exclude payments received under the Coronavirus payment framework from the income testing arrangements under those Acts (where the rules specify that those types of payments are excluded) – this ensures that the relevant payments made under the framework do not count as income for the purposes of income tests under those Acts.

***[Schedule 2, items 1 to 14, paragraph 202(sa) of the ITAA 1936, sections 11-15, 11-55, 53-25 and 59-95 of the ITAA 1997, paragraph 8(8)(zu) of the Social Security Act, item 19B of the table in subsection 8AAB(4), sections 8AAZA and 8AAZAA, and paragraphs 8WA(1AA)(b) and 8WB(1A)(a) and (b) of the TAA 1953, item 143 of the table in subsection 250-10(2) in Schedule 1 to the TAA 1953 and paragraph 5H8(zzd) of the Veterans' Entitlements Act 1986]***

2.82 Schedule 2 to this Bill also makes minor amendments to the *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020* to:

- ensure that the payments under that Act are available to businesses and non-profit entities operating in the external territories; and
- allow the Commissioner to provide further time for an entity to first hold an ABN if it does not hold one on 12 March 2020.

***[Schedule 2, items 22 to 26, sections 2A, 5 and 6 of the Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020]***

2.83 This discretion is only able to be exercised by the Commissioner for unintended situations where the entity was running an active business prior to 12 March 2020 but was not required to have an ABN to operate it.

2.84 This will occur only in limited circumstances, such as for businesses that are conducted in the external Territories. Businesses that only operate in the external Territories are not required to have an ABN as GST does not apply within the external Territories. In order to be eligible for the business boost payment these businesses will need to obtain an ABN. However as they are unlikely to hold an ABN on 12 March 2020, this provision provides the Commissioner with a limited discretion to allow these businesses to hold an ABN later, and still be entitled to the business boost payment. It is envisaged that the Commissioner will release guidance outlined the limited circumstances that this discretion is able to be used.

2.85 This amendment is retrospective but is entirely beneficial to affected entities. It enables the Commissioner to allow for a later time for these entities to obtain an ABN. This can allow relevant entities to become entitled to benefits under the *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020*.

## Modifications of information management provisions in social security law

2.86 Schedule 2 to this Bill also makes a minor amendment to item 40A of the Coronavirus Omnibus Act to specify that the Minister referred to in these provisions is the Minister for Families and Social Services. This amendment is purely for avoidance of doubt. The context of this provision has always made it clear that the Minister referred to was the Minister for Families and Social Services. However, this amendment has been made to ensure that the clearer drafting approach adopted in other contexts did not make the past approach confusing. Similarly, the amendment applies retrospectively so this drafting clarification does not itself create doubt.

***Summary***

2.87 Schedule 2 to this Bill provides a power for the Minister for Families and Social Services to determine modifications to Part 5 of the SSAA. The modifications to the SSAA must be in connection with payments under the Payments and Benefits Bill, including applications for such payments.

2.88 A determination made under the power included in Schedule 7 to this Bill may be necessary to ensure that information is able to be provided by the Australian Taxation Office to Services Australia in connection with payments under the Payments and Benefits Bill,

including applications for such payments. This flexibility is particularly important as the data sharing arrangements between the Australian Taxation Office and Services Australia for payments under the Payments and Benefits Bill have not yet been finalised.

***Detailed amendment***

2.89 The term *Social Services Minister* is defined. Under the current Administrative Arrangements Order, the Social Services Minister is the Minister for Families and Social Services.

2.90 A power is conferred on the Social Services Minister to make a determination that modifies and provision in Part 5 of the SSAA. Part 5 of the SSAA relates to information management. This Part of the SSAA includes provisions relating to the collection, use, recording and disclosure of information, including provisions requiring that information be provided in certain circumstances. Section 2B of the *Acts Interpretation Act 1901* provides that the word *modifies* includes additions, omissions and substitutions.

2.91 A determination may only be made in connection with payments under the Payments and Benefits Bill, including applications for such payments.

2.92 In addition, the Social Services Minister may only make a determination if the Minister is satisfied that that the determination is in response to circumstances relating to the Coronavirus.

2.93 It is intended that a circumstance where the Social Services Minister may make a determination is to permit the Australian Taxation Office to provide information to Services Australia about payments under the Payments and Benefits Bill, to facilitate the efficient assessment of claims for social services payments by Services Australia.

2.94 A determination is a legislative instrument that is subject to disallowance.

2.95 The Social Services Minister's power to make determinations is temporary in nature. The power to make determinations will be repealed at the end of 31 December 2020. Any determinations made by the Minister will cease to have any effect after 31 December 2020.

## Paid parental leave amendments

***Summary***

2.96 Schedule 2 to this Bill also amends the PPL Act to provide that a person in receipt of the JobKeeper Payment will be considered to be

performing qualifying work for the purpose of the paid parental leave work test. This will mean that the period the person receives the JobKeeper Payment will count toward the paid parental leave work test. ***[Schedule 2, items 15 to 21, sections 6, 30, 32, 34, and 35B of the PPL Act]***

2.97 As a result of the Coronavirus, many people who would otherwise have qualified for paid parental leave may no longer meet the requirements of the work test. For example, where a person has been stood down, had their hours of work reduced or ceased work entirely.

2.98 Eligibility for paid parental leave is provided for in Division 3 of Part 2-3 of the PPL Act. To be eligible for paid parental leave, a person must meet all of the following:

- satisfy the work, income and residency tests;
- be the primary carer of the child,
- not return to work until the end of the 18 week paid parental leave period (or if they do, relinquish any remaining entitlement to parental leave pay); and
- not be subject to the Newly Arrived Residents Waiting Period.

2.99 The work test requires that the person:

- perform qualifying work for at least 10 of the 13 months prior to the expected birth date of the child;
- work at least 330 hours during those 10 months; and
- not have a gap in work days of more than 12 weeks.

2.100 Qualifying work involves a person performing at least one hour of paid work on a day or using at least one hour of paid leave of a day. Currently, unpaid leave and being stood down from work would not be considered qualifying work and the person would not satisfy the work test as a result of the impact of the Coronavirus on the economy.

2.101 The amendments to the PPL Act contained in Schedule 2 to this Bill will enable a person or an employer of the person who is entitled to one or more Coronavirus economic response payments for the person for a period, to be considered to be performing qualifying work for the purposes of the paid parental leave work test.

2.102 The amendments also provide for matters pertaining to hours of qualifying work and similar matters to be addressed in the PPL Rules.

***Detailed explanation***

2.103 Schedule 2 to this Bill amends section 6 of the PPL Act to insert definitions for *JobKeeper payment* and *JobKeeper payment period*

referring to new subsections 34(4) and 34(3) respectively, which provide the detailed definitions. ***[Schedule 2, item 15, section 6 of the PPL Act]***

2.104 It also amends the guide to Part 2-3 of the PPL Act, dealing with eligibility for paid parental leave. The amendment includes the words 'Any JobKeeper payment period for the person may also be taken into account' after the existing words 'subsequent child'. This amendment is made to the paragraph of the guide beginning with 'Division 3' which explains the paid parental leave work test.
***[Schedule 2, item 16, section 30 of the PPL Act]***

2.105 Note 3 to section 32 of the PPL Act is amended to insert the words 'and does not also perform qualifying work on that day because of paragraph (e) of that definition,' after 'subsection 34(1)'.
***[Schedule, item 17, note 3 to section 32 of the PPL Act]***

2.106 Further, a fourth note is added at the end of the method statement in section 32 of the PPL Act to provide where a person performs qualifying work on a day as a result of receiving the JobKeeper Payment, the hours of qualifying work can be worked out with reference to section 35B of the PPL Act. New section 35B of the PPL Act provides for this to be dealt with via the PPL Rules. More details on the new section 35B of the PPL Act are provided below.
***[Schedule 2, item 18, note 4 to section 32 of the PPL Act]***

2.107 Schedule 2 of this Bill inserts a new paragraph 34(1)(e) to provide that a person will perform qualifying work on a day if the day is in a JobKeeper payment period for the person.
***[Schedule 2, item 19, paragraph 34(1)(e) of the PPL Act]***

2.108 A further amendment is made to add new subsections 34(3) and 34(4) to the PPL Act.
***[Schedule 2, item 20, subsections 34(3) and (4) to the PPL Act]***

2.109 New subsection 34(3) of the PPL Act defines *jobseeker payment period* for a person to be a period for which:

- an employer of the person is entitled to one or more JobKeeper Payments (not concurrently) for the person; or
- the person themselves is entitled to one or more JobKeeper Payments.

2.110 New subsection 34(4) of the PPL Act defines *JobKeeper payment* as a payment that is payable by the Commonwealth in accordance with rules made under the Payments and Benefits Bill and is known as the JobKeeper Payment.

2.111 Schedule 2 to this Bill also inserts new section 35B into the PPL Act to provide for working out the hours of qualifying work that a person has performed on a day if that day is in a JobKeeper payment

period. New section 35B is made for the purposes of step 5 of the method statement contained in section 32 of the PPL Act.
***[Schedule 2, item 21, section 35B of the PPL Act]***

2.112 Step 5 of the method statement in section 32 of the PPL Act requires the person to have performed at least 330 hours of qualifying work during 10 of the 13 months preceding their paid parental leave claim to satisfy the work test.

2.113 Subsection 35B(1) of the PPL Act provides for the calculation of the number of hours for the work test, for a person who does not perform paid work or take paid leave in a JobKeeper payment period is to be worked out in accordance with the PPL Rules.

2.114 The PPL Rules are made under section 298 of the PPL Act and are a legislative instrument. Section 298 of the PPL Act enables the Minister for Families and Social Services to make rules providing for matters necessary or convenient to give effect to the relevant Act. This extends to the calculations of hours in relation to the work test.

2.115 The PPL Rules already provide for matters pertaining to the work test. For example, Division 2.3.2 sets the parameters of what is considered to be *paid leave* and *paid work* for the purposes of the work test.

2.116 Subsection 35B(2) of the PPL Act provides that new subsection 35B(1) of the PPL Act has effect:

- even if the person also performs qualifying work on that day due to paragraphs 34(1)(a), (b), (c) or (d); and
- despite section 35A of the PPL Act.

## Application and transitional provisions

2.117 The Payments and Benefits Bill commences immediately after the commencement of Part 1 of Schedule 1 to this Bill. ***[Clause 2 of the Payments and Benefits Bill]***

2.118 Payments may only be made under this framework from the day of commencement and in relation to the period from 1 March 2020 to 31 December 2020 (inclusive). This ensures that the payment framework is only in place for a temporary period when needed to provide financial support concerning the Coronavirus.

2.119 Parts 1, 2 and 3 of Schedule 2 to this Bill (that is, all of the amendments other than the modifications of provisions relating to the social security law in Part 4 of Schedule 2 to this Bill) commence at the same time as the Payments and Benefits Bill. ***[Clause 2 of this Bill]***

2.120 The amendments to the Coronavirus Omnibus Act made by Part 4 of Schedule 2 to this Bill commence immediately after the commencement of Schedule 11 to that Act. ***[Clause 2 of this Bill]***

2.121 The other amendments made by Part 4 of Schedule 2 to this Bill commence on the day after the day on which this Bill receives the Royal Assent. ***[Clause 2 of this Bill]***

# *Chapter 3*
# *Guarantee of lending to small and medium enterprises*

## Outline and context of chapter

3.1 Schedule 3 to this Bill makes technical amendments to the Guarantee of Lending Act. The amendments ensure that certain categories of smaller non-ADI lenders will fall within the definition of *financial institution* in that Act.

3.2 The Guarantee of Lending Act gives effect to the Government's commitment to enter into risk-sharing agreements with financial institutions to ensure that credit continues to flow to SMEs so that SMEs can continue to meet their immediate financing needs during uncertain economic conditions caused by the Coronavirus. The Guarantee of Lending Act commenced on 25 March 2020.

## Summary of new law

3.3 The amendments made by Schedule 3 to this Bill provide that exclusions in the *Financial Sector (Collection of Data) Act 2001* of certain corporations from the meaning of *registrable corporation*, which are relevant in determining who is a non-ADI lender, are disregarded for the purposes of the definition of *financial institution* in the Guarantee of Lending Act.

## Comparison of key features of new law and current law

| *New law* | *Current law* |
|---|---|
| Certain non-ADI lenders fall within the definition of *financial institution* in the Guarantee of Lending Act. | Certain non-ADI lenders do not fall within the definition of *financial institution* in the Guarantee of Lending Act. |

## Detailed explanation of new law

3.4 Schedule 3 to this Bill makes amendments to the Guarantee of Lending Act to clarify that paragraphs 7(2)(i), 7(2)(ia) and 7(2)(j) of the *Financial Sector (Collection of Data) Act 2001* are disregarded for the purposes of paragraph (b) of the definition of *financial institution* in section 4 of the Guarantee of Lending Act.
***[Schedule 3, item 1, section 4A of the Guarantee of Lending Act]***

3.5 The amendments allow corporations that are excluded from the definition of *registrable corporation* by paragraphs 7(2)(i), 7(2)(ia) and 7(2)(j) of the *Financial Sector (Collection of Data) Act 2001* to be eligible for a guarantee under the Guarantee of Lending Act. These include corporations that:

- do not meet the monetary thresholds in subsection 7(2A) of the *Financial Sector (Collection of Data) Act 2001*;
- are covered by paragraph 7(2)(ia) of that Act – that is, corporations that are specified in a determination under subsection (2F), or is in a class of corporations specified in a determination under subsection (2F); or
- are covered by paragraph 7(2)(j) of that Act – that is, corporations that are covered by an order given by the Australian Prudential Regulation Authority.

### Application and transitional provisions

3.6 Schedule 3 to this Bill will commence on the day after the day on which this Bill receives Royal Assent.

# *Chapter 4*
# *Amendments to support the child care sector*

## Outline of chapter

4.1 Schedule 4 to this Bill amends the Family Assistance Administration Act to:

- modify the calculation method used for Child Care Subsidy reconciliation to ensure a consistent outcome for individuals who have changed their relationship status during the financial year; and
- meet various circumstances of social and financial hardship being experienced by the child care sector and families, arising from emergency and disaster events including the Coronavirus by ensuring that payments of Additional Child Care Subsidy and certain grants can draw upon standing appropriations.

4.2 The amendments also require that the Minister make rules which prescribe the total amount that can be paid in a financial year.

## Context of amendments

4.3 Part 1 of Schedule 4 to this Bill make amendments to modify the calculation method used for Child Care Subsidy Reconciliation to better reflect an individual's income capacity when the person is partnered for part of the year.

4.4 This provides a fairer more consistent outcome and assists families who are already struggling due to the financial impacts of the Coronavirus.

4.5 The amendments also ensure that payments of Additional Child Care Subsidy and certain grants that are prescribed in the Child Care Subsidy Minister's Rules can draw upon the standing appropriation under the Family Assistance Law.

4.6 This ensures that such payments are able to meet increased sector need and can provide much needed additional financial assistance for the child care sector during times of emergency and disaster, such as during the Coronavirus.

## Summary of new law

4.7 The Family Assistance Administration Act is amended to modify how child care subsidy entitlements are reviewed when:

- an individual is a member of a couple for some but not all of the Child Care Subsidy fortnights in an income year; and
- that individual meets the Child Care Subsidy reconciliation conditions.

4.8 The Family Assistance Administration Act is also amended to ensure that payments of Additional Child Care Subsidy and funding agreements for certain grant programs (as prescribed by the Child Care Subsidy Minister's Rules) occur under the existing standing appropriation for payments made under Family Assistance Law.

4.9 New provisions inserted into the Family Assistance Administration Act require the Child Care Subsidy Minister's Rules to prescribe the total amount of funding that may be allocated for each of the grants programs that are prescribed in the Child Care Subsidy Minister's Rules.

## Comparison of key features of new law and current law

| *New law* | *Current law* |
|---|---|
| The Child Care Subsidy reconciliation calculation is modified for individuals that have a partner for only part of the financial year. | No equivalent |
| Payments of Additional Child Care Subsidy and grants prescribed in the Child Care Subsidy Minister's Rules can draw upon the standing appropriation in Family Assistance Law and require a total cap be prescribed in those rules for any grants. | No equivalent |

## Detailed explanation of new law

### Amendments relating to the treatment of part year partner income in reviewing an individual's Child Care Subsidy entitlements

4.10 Currently a Child Care Subsidy claimant's entitlement to Child Care Subsidy is calculated using the methodology in Schedules 2 and 3 of the Family Assistance Act.

4.11 An individual's adjusted taxable income is one of the inputs used to calculate the individual's entitlement to Child Care Subsidy. During the year, an individual provides estimates of his or her adjusted taxable income (where it is not known) and, on this basis, the individual's estimated Child Care Subsidy entitlement is paid throughout the year.

4.12 Child Care Subsidy reconciliation occurs after the income year, when the individual meets the Child Care Subsidy reconciliation conditions, which in simple terms, is when the individual lodges their income tax return or notifies the relevant Departmental Secretary that they are not required to lodge an income tax return.

4.13 At that point, the relevant Departmental Secretary reviews all entitlement determinations made throughout the year in respect of that individual, using the person's actual adjusted taxable income (and other information relevant to the individual's entitlement), and remakes all entitlement determinations. This can result in individuals owing a debt or being paid more Child Care Subsidy (See sections 103A – 103C and 105E of the Family Assistance Administration Act).

4.14 Currently, as set out in clause 3AA(2)(b) of Schedule 3 to the Family Assistance Administration Act, the adjusted taxable income of an individual with a part year partner is determined by:

- calculating a percentage of the partner's income for the year that corresponds to the period of time the couple was together; and
- adding that to the individual's own adjusted taxable income.

4.15 This methodology has had unfair consequences for individuals in the annual cap result and applicable percentage result that is reached for these individuals throughout the year, resulting in some cases where these individuals owe debts at Child Care Subsidy reconciliation. The concepts of *annual cap* and *applicable percentage* are explained below.

4.16 The annual cap (currently $10,373) applies to an individual for an income year if their adjusted taxable income for the income year exceeds the annual cap income threshold (currently $188,163).

4.17 Where the individual's adjusted taxable income exceeds the annual cap income threshold (that is where the annual cap applies to the individual), the individual can only be paid up to the Child Care Subsidy annual cap amount in an income year. Any amounts in excess of the annual cap are recovered as debts at Child Care Subsidy reconciliation.

4.18 Where the individual's adjusted taxable income is below the annual cap income threshold (that is where the annual cap does not apply to the individual), there is no upper limit of Child Care Subsidy that can be paid to the individual in an income year.

4.19 An individual's applicable percentage is an input used in determining the hourly rate of Child Care Subsidy the person is entitled to for a session of care. An individual's applicable percentage will generally be either 0 per cent, 20 per cent, 50 per cent or 85 per cent determined by reference to the individual's adjusted taxable income. The higher the individual's adjusted taxable income, the lower their applicable percentage.

4.20 The hourly rate of Child Care Subsidy the individual is entitled to for a session of care is the lower of the two amounts, when the individual's applicable percentage is applied to:

- the hourly session fee for the individual (as set by the child care provider); or
- the Child Care Subsidy hourly rate cap for the session (a legislated limit set out in clause 2 of Schedule 2 to the Family Assistance Act).

4.21 This means that an individual's adjusted taxable income for the income year is artificially inflated on account of the current calculation of their adjusted taxable income when they have a part year partner. As a result, the annual cap may apply to them when it should not have and they may have received a lower hourly rate of Child Care Subsidy.

4.22 The amendments made by Schedule 4 to this Bill to section 105E of the Family Assistance Administration Act have the following effect:

- The annual cap will not apply to Child Care Subsidy fortnights where the individual was single and their actual personal adjusted taxable income was under the annual cap income threshold.
- This applies regardless of:
  - when in the year the individual was single and their adjusted taxable income was under the annual cap income threshold;

  - whether the annual cap income threshold applied to other Child Care Subsidy fortnights in the year; or
  - whether the annual cap was reached in those fortnights where the individual's adjusted taxable income when combined with their part year partner's adjusted taxable income (combined adjusted taxable income) exceeded the annual cap income threshold.
- The annual cap will apply to Child Care Subsidy fortnights where the individual's actual personal, or combined adjusted taxable income, exceeds the annual cap income threshold.
- When during Child Care Subsidy fortnights where the annual cap applied an individual is paid up to the annual cap amount, no more Child Care Subsidy is payable to them:
  - for the remainder of that period; or
  - during any subsequent periods that the individual's personal or combined adjusted taxable income exceeds the annual cap income threshold.

4.23 For the purpose of determining the individual's applicable percentage, their adjusted taxable income will also be considered across Child Care Subsidy fortnights, depending on whether or not the individual was single or in a relationship with a part year partner.

4.24 New subsections 105E(4) to (7) of the Family Assistance Administration Act provide for fairer outcomes at Child Care Subsidy reconciliation for individuals with part year partners.

4.25 For the purposes of the new subsections, whether or not the individual was a member of a couple in a Child Care Subsidy fortnight is determined based on whether the individual was a member of a couple on the first Monday in the Child Care Subsidy fortnight.

4.26 New subsection 105E(4) of the Family Assistance Administration Act provides that if an individual is a member of a couple on one or more, but not all, of the first Mondays in Child Care Subsidy fortnights that start in an income year then, when reviewing child care decisions about the individual under subsection 105E(1) to (3) of the Family Assistance Administration Act, the Secretary must review those decisions in accordance with new subsections 105E(5) and (6) of the Family Assistance Administration Act.

4.27 Part 1 of Schedule 2 to the Family Assistance Act sets out the methodology for determining the amounts of Child Care Subsidy an individual is entitled to for a session of care provided in a week.

4.28 New subsection 105E(5) of the Family Assistance Administration Act provides that the relevant Departmental Secretary must apply Part 1 of Schedule 2 to the Family Assistance Act to an individual with a part year partner, for each Child Care Subsidy fortnight that starts in an income year, as if paragraph 3AA(2)(b) of Schedule 3 to the Family Assistance Act had not been enacted.

4.29 Paragraph 3AA(2)(b) of Schedule 3 to the Family Assistance Act provides that the adjusted taxable income of an individual with a part year partner is determined by calculating a percentage of the partner's income for the year that corresponds to the period of time the couple was together, and adding that to the individual's own adjusted taxable income.

4.30 The effect of applying Part 1 of Schedule 2 to the Family Assistance Act to an individual with a part year partner as if paragraph 3AA(2)(b) of Schedule 3 to that Act had not been enacted is that for the purpose of calculating the individual's adjusted taxable income for the income year:

- in those Child Care Subsidy fortnights that the individual was single, only their own personal adjusted taxable income counts towards their adjusted taxable income for the income year; and
- as per new subparagraph 105E(6)(a) of the Family Assistance Administration Act, in those Child Care Subsidy fortnights where the individual was a member of the couple with the part year partner, the individual's adjusted taxable income for the year includes both their own adjusted taxable income as well as the other member of the couple's adjusted taxable income for the income year.

4.31 The individual's adjusted taxable income will be used to determine whether the annual cap applies to the individual in each Child Care Subsidy fortnight and the individual's applicable percentage.

4.32 Subsection 105E(6) of the Family Assistance Administration Act amends paragraph 1(3)(b) of Schedule 2 to the Family Assistance Act, with the amendments applying in those Child Care Subsidy fortnights that start in an income year where the individual had a part year partner. It has the effect that, for those Child Care Subsidy fortnights where the annual cap applies to the individual, the annual cap is reached for a child for an income year if the following amounts together equal the annual cap:

- the amount of Child Care Subsidy the individual is entitled to be paid for sessions of care provided to the child in Child Care Subsidy fortnights starting in the income year; and

- the amount of Child Care Subsidy the other member of the couple is entitled to be paid for sessions of care provided to the same child in those fortnights.

4.33 The intention of subclause 1(3) of Schedule 2 to the Family Assistance Act is to avoid couples 'double dipping' and switching who is the Child Care Subsidy claimant in respect of the child in order to circumvent the annual cap limit. The amendment ensures that this provision continues to apply to individuals with part year partners, as appropriate.

4.34 New subsection 105E(7) of the Family Assistance Administration Act states that subsections 105E(5) and 105E(6) of the Family Assistance Administration Act have effect despite Part 1 of Schedule 2 to the Family Assistance Act. This is to ensure that these subsections have effect when the relevant Departmental Secretary reviews entitlement decisions of individuals with part year partners at Child Care Subsidy reconciliation.

4.35 For the avoidance of doubt, the effect of the amendments is that, at Child Care Subsidy reconciliation, for individuals with part year partners:

- paragraph 3AA(2)(b) of Schedule 3 to the Family Assistance Act is taken to not have been enacted; and
- when determining the amounts of Child Care Subsidy the individual was entitled to:
  - for the Child Care Subsidy fortnights the individual was a member of the couple – Part 1 of Schedule 2 to the Family Assistance Act applies subject to the few amendments in subsection 105E(6) of the Family Assistance Administration Act; and
  - for the Child Care Subsidy fortnights the individual was single – Part 1 of Schedule 2 to the Family Assistance Act continues to apply unamended.

## Amendments relating to Additional Child Care Subsidy and funding agreement appropriations

4.36 Subsection 233(2) of the Family Assistance Administration Act is amended to ensure that payments of Additional Child Care Subsidy and funding agreements for certain grant programs (as prescribed by the Child Care Subsidy Minister's Rules) occur under the existing standing appropriation for payments made under Family Assistance Law (pursuant to subsection 233(1) of the Family Assistance Administration Act).

4.37 The amendments enable Additional Child Care Subsidy to be fully demand-driven and to ensure there is sufficient funding to meet the various circumstances of social and financial hardship being experienced by families arising from the Coronavirus.

4.38 The amendments also enable relevant grant programs which are designed to support child care services experiencing hardship in various circumstances to have access to sufficient funding to support the child care sector during the Coronavirus.

4.39 In particular, it is envisaged that the amendment will enable the Community Child Care Fund – Special Circumstances grant program to meet increased demand from child care services during the Coronavirus.

4.40 The Community Child Care Fund – Special Circumstances grant program will be prescribed in the Child Care Subsidy Minister's Rules as soon as possible after the amendments receive Royal Assent.

4.41 Notwithstanding these amendments, a child care service's eligibility to access Community Child Care Fund – Special Circumstances funding will continue to be set out in the program guidelines which are updated from time to time and publicly available on the Department of Education, Skills and Employment's website.

## Requirement to prescribe total amount of money that may be paid for grants programs under a standing appropriation

4.42 New subsection 233(3) in the Family Assistance Administration Act requires the Child Care Subsidy Minister's Rules to prescribe the total amount of funding appropriated under subsection 233(1) of the Family Assistance Administration Act that may be allocated for each grants program that is prescribed in the Child Care Subsidy Minister's Rules for the purposes of subsection 233(2) of the Family Assistance Administration Act.

4.43 New subsection 233(4) of the Family Assistance Administration Act requires that the amount referred to in subsection 233(3) of that Act must be prescribed before the start of the relevant financial year, but may be varied at any time before the financial year ends.

4.44 New subsection 233(5) of the Family Assistance Administration Act provides the Minister with the discretion to further prescribe total standing appropriation funding limits for specific grants programs that are prescribed in the Child Care Subsidy Minister's Rules. This is intended to ensure that the allocation of funding for certain grants programs may be appropriately capped in accordance with Budget decisions.

4.45 This is an accountability measure intended to ensure that decisions on annual funding amounts for prescribed grants programs established under section 85GA of the Family Assistance Act may continue to be subject to Parliamentary scrutiny (through its inclusion in a legislative instrument).

4.46 These amendments do not commence until 1 July 2020. This means that the Child Care Subsidy Minister's Rules will be required to begin annually prescribing a cap for the total of all grants to be paid under the standing appropriation in subsection 233(1) of the Family Assistance Administration Act from the start of the 2020-21 financial year onwards.

## Application and transitional provisions

4.47 Subitem 2(1) states that the amendments made by item 1 to Schedule 4 to this Bill apply to reviews, at Child Care Subsidy reconciliation, of child care decisions made for sessions of care provided in Child Care Subsidy fortnights starting in the 2019-2020 income year, and in later income years.

4.48 This enables the fairer amended entitlement methodology to be applied for Child Care Subsidy payable for sessions of care provided in the 2019-2020 income year and thereafter.

4.49 Subitem 2(2) states that the amendment made by item 1 Schedule 4 to this Bill has no effect to the extent (if any) to which it would:

- result in an acquisition of property (within the meaning of paragraph 51 (xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph); or
- impose taxation (within the meaning of section 55 of the Constitution).

4.50 These Constitutional application provisions are included as a precautionary measure, in case they may be needed.

4.51 Item 5 to Schedule 4 to this Bill is a transitional provision which provides that paragraph 233(5)(a) of the Family Assistance Administration Act applies in relation to a financial year beginning on or after 1 July 2020.

# *Chapter 5*
# *Modification of information and other requirements*

## Outline of chapter

5.1 Schedule 5 to this Bill provides a temporary mechanism for responsible Ministers to change arrangements for meeting information and documentary requirements under Commonwealth legislation in response to the challenges posed by the Coronavirus.

## Context of amendments

5.2 The social distancing measures and the restrictions on movement and gatherings introduced in response to the Coronavirus are expected to cause difficulties with meeting information and documentary requirements under Commonwealth legislation.

5.3 In recognition of the importance of continued business transactions and government service delivery during the Coronavirus, this measure provides flexibility to temporarily adjust legal obligations and provide certainty about the appropriate ways to meet information and documentary requirements.

## Summary of new law

5.4 Schedule 5 to this Bill allows the responsible Minister for an Act or legislative instrument that requires or permits certain matters (including the giving of information and the signature, production and witnessing of documents) to temporarily alter or adjust these requirements or permissions in response to circumstances relating to the Coronavirus.

5.5 A determination under this mechanism may apply retrospectively. However, a determination will be beneficial to individuals and business by retrospectively validating approaches to providing information or meeting documentary and witnessing requirements that may otherwise have been invalid.

5.6 This mechanism is necessary to respond flexibly to the unprecedented challenges of the Coronavirus, particularly the challenges posed by social distancing measures.

5.7 The mechanism is temporary and will cease to have effect after 31 December 2020.

## Comparison of key features of new law and current law

| *New law* | *Current law* |
|---|---|
| A Minister responsible for an Act or legislative instrument that requires or permits certain matters relating to information and documentation may determine that different arrangements apply in response to the Coronavirus. | No equivalent. |

## Detailed explanation of new law

5.8 Item 1 applies in relation to a provision of an Act or legislative instrument (known as an affected provision) that requires or permits any of the following matters (known as relevant matters):

- the giving of information in writing;
- the signature of a person;
- the production of a document by a person;
- the recording of information;
- the retention of documents or information;
- the witnessing of signatures;
- the certification of matters by witnesses;
- the verification of the identity of witnesses; and
- the attestation of documents.

***[Schedule 5, item 1]***

5.9 The responsible Minister for an affected provision may determine by legislative instrument that, for a specified time period:

- the affected provision is varied or does not apply; or
- another provision specified in the determination applies,.

***[Schedule 5, subitem 1(2)]***

5.10 A determination must only alter the application of the affected provision to the extent it relates to any of the relevant matters outlined above. ***[Schedule 5, subitem 1(2)]***

5.11 The time period specified in a determination can be a period that starts before Schedule 5 to this Bill commences. Applying the determination retrospectively will be beneficial to individuals and business as it will retrospectively validate approaches to providing information or meeting documentary and witnessing requirements that may otherwise have been invalid. ***[Schedule 5, subitem 1(3)]***

5.12 The responsible Minister must not make a determination unless they are satisfied that the determination is in response to circumstances relating to the Coronavirus. ***[Schedule 5, subitem 1(4)]***

5.13 A responsible Minister is defined as:

- any Minister who administers the Act which is being varied; or
- if the affected provision is a provision of a legislative instrument – any Minister who administers the enabling legislation under which a legislative instrument is made.

***[Schedule 5, subitem 1(5)]***

5.14 A determination made by a responsible Minister has effect accordingly and will not operate after 31 December 2020. Likewise, the instrument-making power is intended to be temporary. The provisions inserted by Schedule 5 to this Bill will be repealed at the end of 31 December 2020. ***[Schedule 5, subitems 1(6), (7) and (8)]***

## Application and transitional provisions

5.15 Schedule 5 to this Bill will commence on the day after the day on which this Bill receives Royal Assent. Determinations made under the powers provided for by Schedule 5 to this Bill can apply retrospectively.

5.16 The provisions inserted by Schedule 5 to this Bill will be repealed at the end of 31 December 2020. Any determination made under the new mechanism will also cease to operate after 31 December 2020.

# *Chapter 6*
# *Additional support for veterans*

## Outline of chapter

6.1 Schedule 6 to this Bill allows the Veterans' Minister to:

- Increase, by legislative instrument, the amount paid to persons receiving a payment under a provision of the Veterans' Law by the amount of the COVID-19 supplement; and
- vary the qualifications and eligibility for payments under the Veterans' Law by legislative instrument.

6.2 These instruments may only be made after consultation with the Social Services Minister. Both the powers and any instruments made using them will end on 31 December 2020.

## Context of amendments

6.3 Any additional payments would form part of the Government's commitment to provide financial assistance to those who are financially impacted by the Coronavirus.

## Summary of new law

6.4 Schedule 6 to this Bill provides powers to the Veterans' Minister to increase, by legislative instrument, the amount paid to a person receiving a payment under a provision of the Veterans' Law by the amount of the COVID-19 supplement specified in the legislative instrument.

6.5 It also provides the Veterans' Minister with the power to vary the qualifications and payments under the Veterans' Law by legislative instrument. These determinations may only be made after consultation with the Social Services Minister.

6.6 The powers and any determinations made using them will end on 31 December 2020.

## Comparison of key features of new law and current law

| *New law* | *Current law* |
|---|---|
| The Veterans' Minister may increase payments to veterans and their dependents by legislative instrument by the amount of the COVID-19 supplement. | No equivalent |
| The Veterans' Minister may amend qualification or eligibility requirements for payments to veterans and their dependents by legislative instrument in response to the Coronavirus. | No equivalent |

## Detailed explanation of new law

6.7 Item 1 of Schedule 6 to this Bill sets out definitions used within Schedule 6. The defined terms are: *Social Services Minister*, *veterans' law* and *Veterans' Minister*. The definition of *veterans' law* is intended to encompass all primary legislation under which benefits or assistance are paid to veterans and their dependents. ***[Schedule 6, item 1]***

6.8 Payments to certain veterans and their dependents may be increased by the amount of the COVID-19 supplement. The payment of the COVID-19 supplement (currently $550 per fortnight) is extended to social services recipients receiving:

- JobSeeker Payment (formerly known as Newstart Allowance);
- Youth Allowance;
- Sickness Allowance;
- ABSTUDY (Living Allowance);
- Austudy;
- Parenting Payment;
- Partner Allowance;
- Widow Allowance;
- Farm Household Allowance; or
- Special Benefit.

***[Schedule 6, item 2]***

6.9 These people receive this additional payment either through amendments contained in Part 1 of Schedule 11 to the Coronavirus Omnibus Act or through one of the determinations made by the Social Services Minister made under section 1210B of the Social Security Act. These Determinations include:

- the *Social Security (Coronavirus Economic Response – 2020 Measures No. 1) Determination 2020*; and
- the *Social Security (Coronavirus Economic Response – 2020 Measures No. 2) Determination 2020*.

6.10 The Veterans' Minister receives powers similar to those of the Social Services Minister under section 1210B of the Social Security Act. The principal difference is the requirement for the Veterans' Minister to consult with the Social Services Minister prior to increasing payments. ***[Schedule 6, subitem 2(3)]***

6.11 If a veteran or dependent is receiving a pension, an income support supplement, a payment, compensation, an allowance, or any other pecuniary benefit under the Veterans' Law that person's payment will be increased by the rate of the COVID-19 supplement determined in an instrument for the period specified in the instrument. ***[Schedule 6, subitem 2(1)]***

6.12 In making a legislative instrument determining the kind of payment, the rate of the COVID-19 supplement and the period for which the payment will be increased, the Veterans' Minister (like the Social Services Minister under subsection 1210B(2) of the Social Security Act) must be satisfied that the determination is in response to the circumstances relating to the Coronavirus. ***[Schedule 6, subitem 2(2)]***

6.13 It is intended that these powers would only be exercised by the Veterans' Minister where the Social Services Minister had extended, or was intending to extend, payments of the COVID-19 supplement to an equivalent group of social security recipients. For this reason, the Veterans' Minister must consult with the Social Services Minister prior to exercising these powers. ***[Schedule 6, subitem 2(3)]***

6.14 Item 2 of Schedule 6 to this Bill ceases to apply at the end of the period covered by subsection 646(2) of the Social Security Act. This period is six months from 25 March 2020, unless the period is extended. ***[Schedule 6, subitem 2(4)]***

6.15 Item 3 of Schedule 6 to this Bill provides the Veterans' Minister with the flexibility and legislative instrument-making power to deal with necessary amendments to the qualifications and payments under the Veterans' Law. ***[Schedule 6, item 3]***

6.16 The Veterans' Minister receives powers similar to those of the Social Services Minister under Item 40A of Schedule 11 to the Coronavirus Omnibus Act. The principal difference is the requirement for the Veterans' Minister to consult with the Social Services Minister prior to modifying a qualification or payment. ***[Schedule 6, item 3]***

6.17 This will ensure that payments and assistance for veterans and their dependents can be changed in line with future changes to payments and assistance for equivalent social security recipients. It means the Government can undertake comprehensive measures to address the effects of the Coronavirus without distinction between whether a person receives social security benefits or benefits in recognition of their (or a member of their family's) military service.

6.18 The amendments allow the Veterans' Minister to provide, if necessary, additional economic support payments to persons receiving payments or benefits under Veterans' Law in line with any additional economic support payments to persons receiving payments or benefits under social security legislation.

6.19 The Veterans' Minister may vary, suspend, or impose provisions of Veterans' Law relating to the qualification or eligibility for a pension, an income support supplement, a payment, compensation, an allowance, or any other pecuniary benefit under the Veterans' Law. The Veterans' Minister may also vary provisions applying to the rate of these payments or specify different payment rates. ***[Schedule 6, subitem 3(1)]***

6.20 The Veterans' Minister must be satisfied that the use of these powers is in response to the circumstances relating to the Coronavirus. This is the same requirement which applies to the Social Services Minister under subitem 40A(2) of Schedule 11 to the Coronavirus Omnibus Act. ***[Schedule 6, subitem 3(2)]***

6.21 Instruments made under this item have no operation after 31 December 2020. ***[Schedule 6, subitem 3(5)]***

6.22 The power given to the Veterans' Minister will end when Item 3 of Schedule 6 to this Bill is repealed at the end of 31 December 2020. ***[Schedule 6, subitem 3(6)]***

## Application and transitional provisions

6.23 Schedule 6 to this Bill will commence on the day after the day on which this Bill receives Royal Assent.

# *Chapter 7*
# *Tax secrecy*

## Outline of chapter

7.1 Schedule 7 to this Bill makes amendments to the tax secrecy provisions in the TAA 1953 to allow de-identified protected information to be disclosed to the Treasury for the purposes of policy development, or analysis, in relation to the Coronavirus, including in relation to any programs introduced in response to the economic impacts of the Coronavirus.

7.2 The amendments allow such disclosures to be made until 30 June 2023.

## Context of amendments

7.3 The Coronavirus has required quick, efficient and effective policy responses to deal with its economic impacts. The collating and analysing of available information to monitor economic conditions and inform policy development will be vital as Australia enters into the recovery phase of the pandemic.

7.4 For example, data on the number and types of entities accessing the Government's recent economic response packages and information on the recovery across regions, industries, firms and households can assist and better inform the Government in determining whether additional policy responses are required or desirable.

7.5 Analysis of past experiences of economic shocks and subsequent recoveries such as the 1990s recession, and other economic phenomenon, may also yield insights that can inform the response to the Coronavirus pandemic.

7.6 The data will also allow analysis of the economic impact of the Government's response to the Coronavirus.

7.7 In order to support such analyses, the Government has proposed to allow the Commissioner to disclose de-identified information held about the affairs of an entity to the Treasury Secretary for the purposes of policy development or analysis in relation to the Coronavirus, including in relation to any programs introduced in response to the economic impacts of the Coronavirus.

7.8 The ability to make disclosures is time limited to reflect the intention that disclosures will be made for the purposes of policy development, or analysis, in relation to the Coronavirus pandemic, and as Australia recovers from the pandemic.

## Summary of new law

7.9 Schedule 7 to this Bill makes amendments to subsection 355-65(8) of Schedule 1 to the TAA 1953 to include an additional purpose for which protected information can be disclosed, and to whom.

7.10 A taxation officer will be permitted to disclose de-identified protected information to the Treasury Secretary for the purposes of policy development, or analysis, in relation to the Coronavirus, including in relation to any programs introduced in response to the economic impacts of the Coronavirus.

7.11 Disclosures can be made until 30 June 2023, after which the law will self-repeal.

## Comparison of key features of new law and current law

| *New law* | *Current law* |
|---|---|
| A taxation officer will be permitted to disclose de-identified protected information to the Treasury Secretary for the purposes of policy development, or analysis, in relation to the Coronavirus, including in relation to any programs introduced in response to the economic impacts of the Coronavirus.<br>Such disclosures can be made until 30 June 2023. | No equivalent. |

## Detailed explanation of new law

7.12 Schedule 7 to this Bill inserts new table item 11 into the table in subsection 355-65(8) of Schedule 1 to the TAA 1953 to include an additional purpose for which protected information can be disclosed.
***[Schedule 7, item 1, table item 11 of the table in subsection 355-65(8) of Schedule 1 to the TAA 1953]***

7.13 Section 355-25 of Schedule 1 to the TAA 1953 makes it an offence for a taxation officer to make a record of, or disclose, protected information. Protected information is generally information that relates to the affairs of an entity and identifies, or is reasonably capable of being used to identify, that entity.

7.14 An exception to the offence is contained in section 355-65 of Schedule 1 to the TAA 1953. That section permits a taxation officer to make a disclosure of protected information if an item in a table in the section covers the making of the disclosure.

7.15 The amendments to the table in subsection 355-65(8) of Schedule 1 to the TAA 1953 will allow de-identified protected information to be disclosed to the Secretary of the Department for the purposes of policy development, or analysis, in relation to the Coronavirus, including for programs introduced in response to the economic impacts of the Coronavirus. Analysis can include economic analysis in relation to the Coronavirus.

7.16 The amendment expands on the existing provisions that allow disclosure of de-identified information to the Secretary of the Department such as for the design and amendment of a taxation law or the purpose estimating or analysing taxation revenue or estimating the cost of policy proposals.

7.17 The Secretary of the Department is the Secretary of the Department of State that is administered by the Minister administering these provisions. Currently, this is the Secretary of the Department of the Treasury.

7.18 A defendant bears the evidential burden in relation to the matters in this exception. The reversal of the burden of proof is consistent with the Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition.

7.19 It is appropriate that the evidential burden be reversed in this situation. Matters relating to the disclosure of protected information and for which purposes (such as what information is being disclosed, whether it is de-identified and for what purpose the disclosure is being made) are peculiarly within the knowledge of the person making the disclosure and can be raised in making their defence. It would be significantly more difficult and costly for the prosecution to disprove these facts.

7.20 The amendment self-repeals after 30 June 2023. Disclosures can only be made under these provisions up until 30 June 2023. This ensures that information can be collated an analysed to inform policy development as Australia enters into the recovery phase of the Coronavirus. ***[Schedule 7, item 3, table item 11 of the table in subsection 355-65(8) of Schedule 1 to the TAA 1953]***

## Commencement and application of the amendments

7.21 Part 1 of Schedule 7 to this Bill commences on the day after the Bill receives Royal Assent.

7.22 The amendments made by item 1 of Part 1 of Schedule 7 to this Bill apply to information disclosed on or after the day after this Act receives Royal Assent. ***[Schedule 7, item 2]***

7.23 Part 2 of Schedule 7 to this Bill commences on 1 July 2023.

# *Chapter 8*
# *Statement of Compatibility with Human Rights*

## Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

## *Schedule 1 – Amendment of the Fair Work Act 2009*

8.1 Schedule 1 to this Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

### Overview

8.2 Part 1 of Schedule 1 to this Bill inserts new Part 6-4C into the Fair Work Act, which temporarily enables employers to issue JobKeeper enabling directions. These can provide (subject to various safeguards) for increased flexibility around employees' hours of work via a new JobKeeper enabling stand down direction, performance of duties and location of work. It also enables employers and employees to make agreements for increased flexibility around annual leave arrangements and days and times of work. The FWC will be able to resolve disputes, including by arbitration.

8.3 New Part 6-4C also requires JobKeeper qualifying employers to meet minimum payment obligations to employees who are subject to these arrangements, including by ensuring that at least the value of JobKeeper payments they receive through the Commissioner is passed on to such employees each fortnight, or the amount they would receive for the work they have performed if that would be greater.

8.4 New Part 6-4C also includes rules about accrual of service and calculation of benefits in certain circumstances, and contains rules about its interaction with other laws.

8.5 The amendments made by Part 1 of Schedule 1 to the Bill will enable the greatest number of workplaces in the national workplace relations system to access and make best use of the JobKeeper scheme, with a view to preserving the greatest number of jobs.

8.6 These amendments are time-limited and will automatically be repealed by Part 2 of Schedule 1 on 28 September 2020.

## Human rights implications

8.7 Schedule 1 to this Bill engages the following rights:

- the right to work and rights in work including the right to just and favourable conditions of work – Articles 6(1) and 7 of the International Covenant on Economic, Social and Cultural Rights;
- the right of everyone to social security in Article 9, and the right of everyone to an adequate standard of living for an individual and their family, including adequate food, clothing and housing, and the continuous improvement of living conditions in Article 11 of the International Covenant on Economic, Social and Cultural Rights, and
- The criminal process rights contained in Articles 14 and 15 of the International Covenant on Civil and Political Rights.

***The right of everyone to social security and an adequate standard of living***

8.8 The objective of facilitating the new JobKeeper payment to employees through employers promotes Article 9 and 11 by providing further payment to assist in achieving an adequate standard of living. The pursuit of this objective also promotes human rights by supporting the Convention on the Rights of Persons with Disabilities.

8.9 The measure is compatible with and promotes the right to social security and an adequate standard of living.

***Right to work and rights in work***

8.10 The measure engages the right to work and rights in work in Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights.

8.11 Article 6(1) recognises the right to work and obliges States Parties to take appropriate steps to safeguard this right. The United Nations Committee on Economic, Social and Cultural Rights has stated that the right to work in Article 6(1) of the International Covenant on Economic, Social and Cultural Rights encompasses the need to provide the worker with just and favourable conditions of work.

8.12 Article 7 requires that States Parties recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular, remuneration that provides all workers with fair wages, a decent living and rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

8.13 The measures also support implementation of a range of ILO instruments that Australia has ratified, including the *Unemployment Convention 1919 (No. 2)*, which was adopted with regard to the 'question of preventing or providing against unemployment'.

8.14 Australia has also ratified the ILO's *Employment Policy Convention 1964 (No.122)* (ILO Convention 122) which the ILO considers a 'priority' governance convention. The measures support Article 1 of ILO Convention 122:

> 8.15With a view to stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment, each Member shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment.

8.16 Part 1 of Schedule 1 will help sustain the viability of Australian businesses during the unprecedented Coronavirus pandemic. It will only apply to employers who are accessing the Government's JobKeeper scheme, which will assist businesses affected by the Coronavirus pandemic to cover the cost of the wages of their employees and ensure employees receive a minimum payment even if they are working reduced hours. It will enable employers to temporarily alter a range of conditions of employment of their employees, including to direct employees to work reduced or no hours (referred to as a *JobKeeper enabling stand down direction*); to work at different locations, including at home; and to perform a broader or different range of duties. Employers will also be able to request that employees take paid annual leave or perform their duties on different days or at different times, and employees must consider and not unreasonably refuse these requests.

8.17 These amendments are subject to a range of safeguards, including mandatory consultation, agreement by the employee for certain changes and a requirement that directions by the employer must not be unreasonable in all of the circumstances. Furthermore, JobKeeper enabling stand down directions can only be used during periods in which the employee cannot be usefully employed for their normal days or hours because of changes to business attributable to the Coronavirus pandemic or government initiatives to slow the transmission of Coronavirus Changes can only be made to an employee's duties where the new duties are safe, including having regard to the nature and spread of Coronavirus, and all existing work health and safety protections continue to apply.

8.18 Part 1 of Schedule 1 creates a dispute resolution mechanism for when employees disagree with this assessment. Failure to comply with an FWC order dealing with a dispute attracts a civil penalty of 60 penalty units for an individual and 300 penalty units for a body corporate. An employer who knowingly purports to give a JobKeeper enabling direction when they are not authorised to do so faces a civil penalty of 600 penalty

units for an individual or 3,000 penalty units for a body corporate. Finally, Fair Work Inspectors will be able to exercise their compliance powers under the Fair Work Act to investigate any suspected contraventions of these provisions.

8.19 The amendments seek to balance the impact on employees by providing that employees who are working reduced hours as a result of a JobKeeper enabling direction have a right to request to engage in reasonable secondary employment or undertake training or professional development. Employers must consider and not unreasonably refuse any such requests. To minimise the impact on employees the amendments provide that employers must ensure that affected employees' hourly rates of pay are not reduced from their previous level if they are working reduced hours.

8.20 Critically, where an employee is eligible to receive a JobKeeper payment, the employer must ensure the person's salary is the greater of the JobKeeper payment or the amount that is payable to the employee in relation to the work performed during the fortnight. Employers who fail to comply with these new requirements face civil penalties of 60 penalty units for an individual and 300 penalty units for a body corporate. Finally, the giving of a JobKeeper enabling direction does not amount to a redundancy. This safeguards the ongoing employment relationship that is critical for a person's eligibility for the JobKeeper payment.

8.21 These amendments engage the right to work and rights in work because they will temporarily supersede arrangements that have been collectively bargained at workplaces. The legitimate objective of these measures is to facilitate ongoing employment and support the Australian economy during the Coronavirus pandemic. These time limited measures are designed to support employers to manage their workplace during the Coronavirus pandemic and maximise employee retention rates.

8.22 These measures are reasonable, necessary and proportionate in the context of the extreme economic impacts of the Coronavirus pandemic. The additional capacity for employers to issue directions relating to duties of work and location of work will not only be time limited but will also only be able to be used where the employer reasonably believes that the JobKeeper enabling direction is necessary to continue the employment of the employee.

8.23 In any event, these powers are temporary and are subject to a range of safeguards such as consultation requirements and the ability of parties to have disputes settled by the FWC. Importantly, this measure is implemented in the context of a new JobKeeper payment, which will subsidise wages during this period to facilitate keeping people in work, and is subject to a number of safeguards designed to minimise the impact on employees.

8.24 The measure is compatible with and promotes the right to work.

***Criminal process rights***

8.25 The Parliamentary Joint Committee on Human Rights Practice Note 2 provides that civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the International Covenant on Civil and Political Rights, regardless of the distinction between criminal and civil penalties in domestic law. When a provision imposes a civil penalty, an assessment is required as to whether it amounts to a criminal penalty for the purposes of International Covenant on Civil and Political Rights.

8.26 Schedule 1 to this Bill creates new civil penalties. The first applies where an employer fails to satisfy jobseeker payment rules in relation to an eligible employee. This attracts a maximum penalty of 60 penalty units for an individual and 300 penalty units for a body corporate, or 600 penalty units for an individual and 3,000 penalty units for a body corporate if the contravention is a 'serious contravention' where a person knowingly contravened the provision as part of a systematic pattern of conduct (section 557A of the Fair Work Act).

8.27 Civil penalties also apply where a person:

- fails to comply with an FWC order dealing with a dispute about the operation of the new Part;
- fails to pay an employee a wage that is the greater of the amount of the JobKeeper payment payable to the employer for the employee for the fortnight, or the amount that is payable to the employee in relation to the performance of work during that fortnight;
- reduces the hourly rate of pay of an employee who is working reduced hours as a result of a JobKeeper enabling direction; or
- fails to consider or unreasonably refuses a request from an employee who is working reduced hours for secondary employment or training.

8.28 Contravening these requirements attracts a maximum civil penalty of 60 penalty units for an individual and 300 penalty units for a body corporate.

8.29 Finally, civil penalties will apply to employers who purport to give a JobKeeper enabling direction where they knew the direction was not authorised by new Part 6-4C of the Fair Work Act. This attracts a maximum civil penalty of 600 penalty units for individuals and 3,000 penalty units for bodies corporate to reflect the seriousness of this conduct.

8.30 The penalty provisions of the Fair Work Act are expressly classified as civil penalties (section 549). These provisions create pecuniary penalties in the form of a debt payable to the Commonwealth or other person. The civil penalty provisions do not impose criminal liability, and do not lead to the creation of a criminal record. There is no possibility of imprisonment for failing to pay a penalty (section 571).

8.31 The purpose of these penalties is to encourage compliance with the Fair Work Act, which supports the implementation of a number of Australia's obligations under international law. These penalties will generally apply to a defined class of employers (that is, those qualifying or purporting to qualify for the JobKeeper scheme) and not the public in general. While the Fair Work Ombudsman has enforcement powers, proceedings may also be brought by an affected employee or union. These factors all suggest that the civil penalties imposed by the Fair Work Act are civil rather than criminal in nature.

8.32 The severity of the relevant civil penalties should be considered low. They are pecuniary penalties (rather than a more severe punishment like imprisonment) and there is no sanction of imprisonment for non-payment of penalties.

8.33 As the proposed new civil penalties may reasonably be characterised as not being criminal in nature, the specific criminal process guarantees in Articles 14 and 15 will not apply. In any event, however, new civil penalties comply with the requirements of Articles 14 and 15 in that they would not apply retrospectively (Article 15(1)), the normal standard of proof applies (Article 14(2)), and there is no risk of double punishment as there is no comparable criminal penalty (Article 14(7)).

8.34 On this basis, the proposed new penalties should not be considered criminal for the purposes of human rights law. In any event, the proposed penalties and the civil penalty regime in the Fair Work Act more broadly comply with the requirements of Article 14 and 15 of the International Covenant on Civil and Political Rights.

### Conclusion

8.35 Schedule 1 to this Bill is compatible with human rights.

## *Schedule 2 – Coronavirus Economic Response Package (Payments and Benefits) Bill 2020 and consequential amendments*

8.36 The Payments and Benefits Bill and Schedule 2 to this Bill are compatible with the human rights and freedoms recognised or declared in

the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

## Overview

8.37 The Payments and Benefits Bill establishes a framework for the Treasurer to make rules to provide for the Commissioner to make payments to eligible entities. Under this payment framework, the Commissioner has general administration of these payments.

8.38 The framework also sets out:

- the manner in which payments are made;
- rules for overpayments (including the application of interest);
- the process for the review of decision relating to the payments; and
- the applicable record-keeping requirements.

8.39 Details of eligibility for particular payments as well as the amount of payments and the time when they are to be paid are to be set out in the rules made by the Treasurer. This allows for flexibility of the arrangements to introduce and modify payments to appropriately respond to the impacts of the Coronavirus.

8.40 The payments may only be made by the Commissioner from the day of commencement and only in respect of the period from 1 March 2020 until 31 December 2020 (inclusive).

8.41 Schedule 2 to this Bill makes a number of consequential amendments to facilitate the Payments and Benefits Bill, including:

- technical amendments to the ITAA 1936, ITAA 1997, the Social Security Act and the *Veterans' Entitlement Act 1986* to ensure a consistent treatment of the Coronavirus economic response payments;
- amendments of a machinery nature to the *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020*;
- providing a power in the Coronavirus Omnibus Act for the Minister for Families and Social Services to determine modifications to Part 5 of the SSAA – the modifications to the SSAA must be in connection with payments under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*, including applications for such payments; and

- amendments to the PPL Act to address relevant changes to paid parental leave as a result of the Coronavirus economic response payments.

## Human rights implications

8.42 The Payments and Benefits Bill does not engage any of the applicable rights or freedoms.

8.43 Schedule 2 to this Bill engages the following human rights or freedoms:

***The right to protection and assistance for families***

8.44 The right to protection and assistance to families, particularly mothers during a reasonable period before and after childbirth in Article 10(2) of the *International Covenant on Economic, Social and Cultural Rights*, recognises protection should be accorded to mothers. During such a period, working mothers should be accorded paid leave or leave with adequate social security benefits.

8.45 Schedule 2 to this Bill engages these rights by broadening the eligibility criteria under the PPL Act to allow more women to access paid parental leave.

8.46 The United Nations Committee on Economic, Social and Cultural Rights has commented that Article 7 of the *International Covenant on Economic, Social and Cultural Rights* requires State Parties to take steps to 'reduce the constraints faced by men and women in reconciling professional and family responsibilities by promoting adequate policies for childcare and care of dependent family members'.

***The right to maternity leave***

8.47 The right to maternity leave is contained within Article 11(2)(b) of the *Convention on the Elimination of All Forms of Discrimination Against Women* and Article 10(2) of the *International Covenant on Economic, Social and Cultural Rights*. Article 11(2)(b) of the Convention requires States Parties 'to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances'.

8.48 The amendments in Schedule 2 to this Bill do not interfere with the existing rights under the *Fair Work Act 2009*, including access to 12 months of unpaid parental leave, noting that Australia has a reservation in relation to Article 11(2)(b) of the *Convention on the Elimination of All Forms of Discrimination Against Women*.

***The right to social security***

8.49 Article 9 of the *International Covenant on Economic, Social and Cultural Rights* recognises the right of everyone to social security, and Article 26 of the *Convention on the Rights of Children* recognises the right of every child to benefit from social security. Schedule 2 to this Bill engages these rights by broadening the eligibility criteria under the PPL Act and increasing the number of claimants who can receive the entitlement to paid parental leave during the COVID-19 pandemic.

***The right to privacy***

8.50 The amendments made by Schedule 2 to this Bill engage the prohibition on arbitrary or unlawful interference with privacy contained in Article 17 of the *International Covenant on Civil and Political Rights* by widening the purposes for which tax file numbers can be shared between the Commissioner and other Commonwealth agencies to include purposes related to the JobKeeper payment in order to permit sharing in order to address issues of fraud and overpayment.

8.51 Schedule 2 to this Bill is compatible with Article 17 of the *International Covenant on Civil and Political Rights*, as its engagement with the prohibition on interference with privacy will neither be unlawful nor arbitrary. The amendments are not arbitrary as the amendments are aimed at a legitimate objective and constitute an effective and proportionate means of achieving that objective.

8.52 This Schedule's engagement with the prohibition on interference with privacy is lawful as the amendments authorise the disclosure of only in relation to the administration of the JobKeeper payment. The amendments constitute an effective and proportionate means of achieving these objectives.

8.53 Schedule 2 to this Bill also provides a power for the Minister for Families and Social Services to determine modifications to Part 5 of the SSAA. The modifications to the SSAA must be in connection with payments under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*, including applications for such payments. This part of the Schedule does not engage with the right to privacy because it does not itself make any substantive amendment to the SSAA.

## Conclusion

8.54 The Payments and Benefits Bill and Schedule 2 to this Bill are compatible with human rights as it does not raise any human rights issues.

## *Schedule 3 – Guarantee of lending* to small and medium enterprises

8.55 Schedule 3 to this Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### Overview

8.56 Schedule 3 to this Bill amends the definition of *financial institution* in section 4 of the Guarantee of Lending Act. The amendment ensures that exclusions in the *Financial Sector (Collection of Data) Act 2001* of certain corporations from the meaning of registrable corporation, which are relevant in determining who is a non-ADI lender, are disregarded for the purposes of the definition of *financial institution* in section 4 of the Guarantee of Lending Act.

### Human rights implications

8.57 Schedule 3 to this Bill does not engage any of the applicable rights or freedoms.

### Conclusion

8.58 Schedule 3 to this Bill is compatible with human rights as it does not raise any human rights issues.

## *Schedule 4 – Amendments to support the child care sector*

8.59 Schedule 4 to this Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### Overview

8.60 New subsections 105E(4) to (7) of the Family Assistance Administration Act modify how Child Care Subsidy entitlements are reviewed when an individual who is a member of a couple for some but not all of the Child Care Subsidy fortnights in an income year.

8.61 There are no changes to how Child Care Subsidy is calculated and paid during the income year based on estimates for the individual's adjusted taxable income. These amendments only affect the review of determinations made in the previous income year once the individual meets the Child Care Subsidy reconciliation conditions and accurate information about their actual adjusted taxable income is available.

8.62 Subsection 233(2) of the Family Assistance Administration Act is amended to ensure that payments of Additional Child Care Subsidy and funding agreements for certain grants programs (as prescribed by the Child Care Subsidy Minister's Rules) occur under the existing standing appropriation for payments made under the Family Assistance Law (pursuant to subsection 233(1) of the Family Assistance Administration Act).

8.63 New subsection 233(3) of the Family Assistance Administration Act requires the Child Care Subsidy Minister's Rules to prescribe the total amount of funding appropriated under subsection 233(1) of that Act that may be allocated for each of the grants programs prescribed in the Child Care Subsidy Minister's Rules for the purposes of subsection 233(2) of the Family Assistance Administration Act.

8.64 This is an accountability measure intended to ensure that decisions on annual funding amounts for prescribed grants programs established under section 85GA of the Family Assistance Act may continue to be subject to Parliamentary scrutiny (through its inclusion in a legislative instrument).

## Human rights implications

***Ensuring the rights of parents and children***

8.65 Article 3 of the *Convention on the Rights of the Child* recognises that in all actions concerning children, the best interests of the child shall be a primary consideration. Article 19 of the Convention requires that appropriate measures are taken to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.

8.66 Early learning and child care play a vital role in the development of Australian children. Their preparation for school and access to this care is also one of the most effective early intervention strategies to break the cycle of poverty. The amendments in Schedule 4 to this Bill facilitate families' continued access to quality child care services and therefore safeguard the best interests of children to be educated and cared for in safe and healthy environments, particularly where there is increased demand for higher levels of government support in times of national emergency or other exceptional circumstances.

8.67 Schedule 4 to this Bill achieves this by removing restrictions around the requirements for the annual appropriation of Additional Child Care Subsidy payments, as well as payments made for child care-related grant programs, so that these payments are linked instead to a special appropriation already established under the Family Assistance Administration Act. This measure ensures that the Government is able to

respond effectively to periods of increased demand for government support by child care services and the families relying on those serviced, for example during times of national emergency or disaster.

***Right to an adequate standard of living***

8.68 Article 27 of the *Convention on the Rights of the Child* requires that State Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

8.69 Schedule 4 to this Bill advances this right by helping to ensure that children, particularly those in vulnerable and disadvantaged situations (that would in most cases be eligible for Additional Child Care Subsidy), may continue to access quality early childhood education and care even in the face of increased demand for additional support and subsidy, such as during the Coronavirus.

8.70 In particular, the amendments ensure the payment of Additional Child Care Subsidy occurs under a standing appropriation (rather than capped and annual appropriation) and ensures that children (and their families) who are experiencing financial hardship or are otherwise in vulnerable positions in times of generally increased demand for government support and subsidies may continue to benefit from a high standard of education and care.

***Right to social security***

8.71 Article 9 of the *International Covenant on Economic, Social and Cultural Rights* recognises the right of everyone to social security.

8.72 Schedule 4 to this Bill allows individuals whose partnership status changes throughout the year to receive fairer determinations of their Child Care Subsidy entitlements at Child Care Subsidy reconciliation due to a modified calculation of the individual's adjusted taxable income, which incorporates their partner's adjusted taxable income throughout the year in a manner that is fairer and more consistent.

## Conclusion

8.73 Schedule 4 to this Bill is compatible with human rights as it does not raise any human rights issues.

## *Schedule 5 – Modification of information and other requirements*

8.74 Schedule 5 to this Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### Overview

8.75 Schedule 5 to this Bill provides a temporary mechanism to change arrangements for meeting information and documentary requirements under Commonwealth legislation, in response to circumstances relating to the Coronavirus. In particular, social distancing measures are expected to cause difficulties with meeting information and documentary requirements, including signature, witnessing and production of documents.

8.76 Under this mechanism, a responsible Minister may determine that provisions in Commonwealth legislation containing particular information or documentary requirements are varied, do not apply or that another provision specified in the determination applies, for a specified time period. The mechanism must not be exercised by a responsible Minister unless the Minister is satisfied that the determination is in response to circumstances relating to the Coronavirus.

8.77 The mechanism is temporary and will be repealed at the end of 31 December 2020. Any determination made under the mechanism will also cease to operate after 31 December 2020.

### Human rights implications

8.78 Schedule 5 to this Bill does not engage any of the applicable rights or freedoms.

8.79 Each instrument made under the power provided for in Schedule 5 to this Bill will be disallowable and will include a human rights compatibility statement assessing the impact of the instrument on human rights and freedoms.

### Conclusion

8.80 Schedule 5 to this Bill is compatible with human rights as it does not raise any human rights issues.

## *Schedule 6 – Additional support for veterans*

8.81 Schedule 6 to this Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### Overview

8.82 Schedule 6 to this Bill allows the Veterans' Minister to:

- increase, by legislative instrument, the amount paid to persons receiving a payment under a provision of the Veterans' Law by the amount of the COVID-19 supplement (currently $550 per fortnight); and
- vary the qualifications and eligibility for payments under the Veterans' Law by legislative instrument.

8.83 These instruments may only be made after consultation with the Social Services Minister. Both the powers and any instruments made using them will end on 31 December 2020.

### Human rights implications

8.84 Schedule 6 to this Bill engages the right of everyone to social security in article 9 of the *International Covenant on Economic, Social and Cultural Rights*, and the right of everyone to an adequate standard of living for an individual and their family, including adequate food, clothing and housing, and the continuous improvement of living conditions in Article 11 of the Covenant; and

8.85 Articles 9 and 11 are promoted by providing further payment to assist in achieving an adequate standard of living. This is achieved by creating a new category of supplementary payment in response to the Coronavirus pandemic.

### Conclusion

8.86 Schedule 6 to this Bill is compatible with human rights as it does not raise any human rights issues.

## *Schedule 7 – Tax secrecy*

8.87 Schedule 7 to this Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

## Overview

8.88 Schedule 7 to this Bill makes amendments to subsection 355-65(8) of Schedule 1 to the TAA 1953 to include an additional purpose for which protected information can be disclosed, and to whom.

8.89 A taxation officer will be permitted to disclose de-identified protected information to the Treasury Secretary for the purposes of policy development, or analysis, in relation to the Coronavirus, including in relation to any programs introduced in response to the economic impacts of the Coronavirus.

8.90 Disclosures can be made until 30 June 2023, after which the law will self-repeal.

## Human rights implications

8.91 The amendments made by Schedule 7 to this Bill engage:

- the right to be presumed innocent until proven guilty according to the law in Article 14(2) of the *International Covenant on Civil and Political Rights*; and
- the prohibition on arbitrary or unlawful interference with privacy contained in Article 17 of the *International Covenant on Civil and Political Rights*.

8.92 The amendments made by Schedule 7 to this Bill engage Article 14(2) of the *International Covenant on Civil and Political Rights* as the amendments provide for an exception to the prohibition of a taxation officer disclosing protected information. The prohibition is a criminal offence. A taxation officer wishing to rely on the exception bears the evidential burden in relation to the matters.

8.93 It is appropriate that the evidential burden be reversed in this situation as matters relating to the disclosure and for which purposes (such as what information is being disclosed, whether it is de-identified and for what purpose the disclosure is being made) are peculiarly within the knowledge of the person making the disclosure and can be raised in making their defence. It would be significantly more difficult and costly for the prosecution to disprove these facts.

8.94 The amendments made by Schedule 7 to this Bill are compatible with Article 17 of the *International Covenant on Civil and Political Rights* as its engagement will neither be unlawful or arbitrary.

8.95 In order for an interference with the right to privacy to be permissible, the interference must:

- be authorised by law;

- be for a reason consistent with the International Covenant on Civil and Political Rights; and
- be reasonable in the particular circumstances.

8.96 The United Nations Human Rights Committee has interpreted the requirement of 'reasonableness' to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

8.97 The engagement with the prohibition on the interference with privacy is lawful as the amendments authorise the disclosure of de-identified information for the purposes of policy development, or analysis, in relation to the Coronavirus, including for programs introduced in response to the economic impacts of the Coronavirus. De-identified information does not include the name, contact details or Australian Business Number of the entity. Therefore appropriate safeguards are in place.

8.98 The amendments are not arbitrary as they are aimed at a legitimate objective, and are reasonable and proportionate in achieving that objective. The Coronavirus pandemic has required quick, efficient and effective policy responses to deal with its economic impacts. The collating and analysing of available information to inform policy development will be vital as Australia enters into the recovery phase of the pandemic.

8.99 The amendments are also proportionate. The amendments will self-repeal after 30 June 2023. This reflects the intention that disclosures will be made for the purposes of policy development, or analysis, in relation to the Coronavirus pandemic, and as Australia recovers from the pandemic.

8.100 The amendments are reasonable in achieving this objective as they allow the disclosure de-identified information about the affairs of an entity held by the Commissioner to the Treasury Secretary for certain purposes. They are also proportionate in achieving this objective as they only allow the disclosure of de-identified information and are time limited.

## Conclusion

8.101 Schedule 7 to this Bill is compatible with human rights as it does not limit any applicable human rights or freedoms.

# EXPLANATORY STATEMENT

## Issued by authority of the Treasurer

*Coronavirus Economic Response Package (Payments and Benefits) Act 2020*

*Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*

Subsection 20(1) of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (the Act) provides that the Treasurer may make rules prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Subsection 7(1) of the Act provides that the rules may make provision for and in relation to one or more kinds of payments by the Commonwealth to an entity in respect of a time that occurs during the prescribed period (the period between 1 March 2020 and 31 December 2020), and the establishment of a scheme providing for matters relating to one or more of those payments, and matters relating to such a scheme. Any payments must relate to the prescribed period – the period from 1 March 2020 to 31 December 2020. However, payments under the JobKeeper scheme can only be made after the commencement of both the Act and the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (the Rules) that provide for payments – earlier events within the period may affect entitlement to a payment but all payments must be made prospectively.

The object of the Act is to provide financial support to entities to assist with the impact of the Coronavirus known as COVID-19. In particular, the Act establishes a framework for the Treasurer to make rules about one or more kinds of payments to an entity in respect of a prescribed period.

On 30 March 2020, the Australian Government announced a wage subsidy called the JobKeeper payment for entities that have been significantly affected by the economic impacts of the Coronavirus.

The purpose of the Rules is to establish the JobKeeper payment scheme and specify details about the scheme, including:

- the start and end date of the scheme;
- when an employer or business is entitled to a payment;
- the amount and timing of a payment; and
- other matters relevant to the administration of the payment.

The Rules specify that the JobKeeper payment is available in fortnightly periods between 30 March 2020 and 27 September 2020 – a period of 26 weeks.

A business that is entitled to the JobKeeper payment will receive a fixed payment of $1,500 per fortnight per eligible employee. The payment must have already been passed on to the eligible employee in full. The payment provides the equivalent of approximately 70 per cent of the national median wage. In addition a business may be entitled to the JobKeeper payment for the business owner or a nominated owner regardless of whether the business has eligible employees.

By temporarily offsetting wage costs, the JobKeeper scheme supports businesses to retain staff – and continue paying them – despite suffering decreased turnover during this period of downturn. The payment also supports these businesses to recommence their operations or scale up operations quickly without needing to rehire when the downturn is over.

Goods and services tax does not apply in relation to JobKeeper payments made to employers because the payments are not consideration for supplies made by employers to the Government.

Details of the Rules are set out in Attachment A.

Prior to making this instrument, consultation was conducted with a number of stakeholders, including the Australian Taxation Office, the Attorney-General's Department and the Department of Social Services.

An exemption from Regulation Impact Statement requirements was granted by the Prime Minister as there were urgent and unforeseen events.

The Rules are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Rules commenced immediately after the time they were registered on the Federal Register of Legislation.

A Statement of Compatibility with Human Rights is at Attachment B.

**ATTACHMENT A**

## Details of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*

## Part 1 – Preliminary

Section 1 – Name

Section 1 provides that the name of the instrument is the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*.

Section 2 – Commencement

Section 2 provides that the Rules commenced immediately after the time of registration on the Federal Register of Legislation.

Section 3 – Authority

Section 3 provides that the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* is the enabling legislation under which the Rules are made.

Section 4 – Definitions

Section 4 provides definitions of expressions used in the Rules. Expressions used in the Rules that are not defined in subsection 4(1) and that are defined in the *Income Tax Assessment Act 1997* have the same meaning as in that Act. This reflects that the JobKeeper scheme is administered by the Commissioner of Taxation (the Commissioner) and that in some instances the Rules governing the operation of the scheme rely on established taxation principles.

## Part 2 - JobKeeper scheme

Part 2 of the Rules provides for the JobKeeper scheme.

Division 1 (section 5) contains a simplified outline of the JobKeeper payment that provides a broad description of the operation of the scheme.

Division 2 sets outs the rules for when an employer with eligible employees is entitled to the JobKeeper payment. The aim of the JobKeeper payment is to assist employers to retain staff during the Coronavirus outbreak, so that these entities can recommence or scale up operations once conditions allow.

Division 3 sets out the rules for when a business owner is entitled to a JobKeeper payment. A business can be entitled to a JobKeeper payment for one business participant who is actively engaged in operating the business.

JobKeeper payments are in respect of fortnightly periods, commencing on 30 March 2020 for a maximum of 13 fortnights (provided the employer was entitled to the payment for the fortnight commencing on 30 March 2020). This means the last fortnight in respect of which a JobKeeper payment may be paid is the fortnight commencing on 14 September 2020 and ending on 27 September 2020.

Division 4 and Division 5 set out the rules regarding the amount of the JobKeeper payment and administration of the JobKeeper scheme.

**Division 2 - When is an employer entitled to a JobKeeper payment?**

In general terms, an employer is entitled to a JobKeeper payment for a fortnight if:

- the fortnight is a JobKeeper fortnight;
- the employer qualifies for the scheme on or before the end of the fortnight;
- the payment is for a person who is an eligible employee of the employer;
- the employer has satisfied the wage condition by making payments to the eligible employee equal to or greater than the amount of JobKeeper payment (less PAYG withholding and salary packaging) that the employer will receive for the employee for the fortnight; and
- the employer has notified the Commissioner of a range of matters, including notification of its election to participate in the scheme.

Each of these requirements is described in greater detail below.

There are tests within the Rules that must have been satisfied on 1 March 2020, and other tests that must be satisfied during the fortnight in respect of which a JobKeeper payment is to be made. The date 1 March 2020 is used as the relevant date in relation to elements of the JobKeeper scheme because it was in March 2020 that Australian employers began to most acutely experience the effects of the downturn caused by the Coronavirus. This reflects the intention that the JobKeeper scheme covers entities that have been significantly affected by the economic impacts of the Coronavirus.

What is a JobKeeper fortnight?

An employer receives a JobKeeper payment in respect of each JobKeeper fortnight in which they are entitled to the payment.

Entitlement to a JobKeeper payment is assessed in relation to a fortnightly period known as a JobKeeper fortnight. Each of the following is a JobKeeper fortnight:

- the fortnight beginning on 30 March 2020; and
- each subsequent fortnight, ending with the fortnight ending on 27 September 2020.

This means that the JobKeeper scheme commences on 30 March 2020 and ends on 27 September 2020 – a period of 26 weeks. This reflects that the JobKeeper payment is a temporary measure for a limited period only to support entities that have been significantly affected by the economic impacts of the Coronavirus.

How does an employer qualify for the JobKeeper scheme?

The JobKeeper payment is only available to an employer who qualifies for the scheme. An employer will qualify for the scheme for a particular fortnight if:

- it satisfies the following requirements:
  - on 1 March 2020, it carried on a business in Australia or was a non-profit body pursuing its objectives principally in Australia;
  - before the end of the fortnight, it met the decline in turnover test; and
- none of the following applies:
  - on 1 March 2020, it had been subject to the levy imposed by the *Major Bank Levy Act 2017* for any quarter ending before this date, or it was a member of a consolidated group and another member of the group had been subject to the levy;
  - it is a government body of a particular kind, or a wholly-owned entity of such a body; or
  - at any time in the fortnight, a provisional liquidator or liquidator has been appointed to the business or a trustee in bankruptcy had been appointed to the individual's property.

Once an employer decides to participate in the JobKeeper scheme and their eligible employees have agreed to be nominated by the employer, the employer must ensure that all of these eligible employees are covered by their participation in the scheme. This includes all eligible employees who are undertaking work for the employer or have been stood down. The employer cannot select which eligible employees will participate in the scheme. This 'one in, all in' rule is a key feature of the scheme.

The JobKeeper scheme operates on a prospective basis only. Entitlement only arises for those JobKeeper fortnights and later fortnights in which eligible employers are registered under the scheme prior to the end of a JobKeeper fortnight. The only exception to this is for the month of April 2020. In April 2020 employers may register prior to the end of April and if they meet the eligibility rules receive JobKeeper payments for eligible employees for JobKeeper fortnights in the two JobKeeper fortnights commencing from 30 March 2020.

Another key element of the scheme is that qualifying employers that decide to participate in the JobKeeper scheme must, as a condition of entitlement, notify all employees in writing that they have elected to participate in the scheme and that their eligible employees will all be covered by the scheme.

*Carrying on a business or pursuing objectives as a non-profit body*

To be a qualifying employer, on 1 March 2020, the employer must have either been carrying on a business in Australia or been a non-profit body pursuing its objectives principally in Australia.

The term ‘business’ is defined in section 995-1 of the *Income Tax Assessment Act 1997*. As noted in the dictionary for the Rules, the term ‘non-profit body’ takes the same meaning as given to the term in section 23-15 of the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act).

An employer that was not carrying on a business in Australia or was not a non-profit body pursuing its objectives principally in Australia on 1 March 2020 – for example, because it ceased before that date or because it commenced after that date – is not a qualifying employer for the purposes of the JobKeeper scheme.

Subject to any other exclusions, a business may be an Australian resident entity or a foreign resident entity carrying on business in Australia.

*Decline in turnover test*

The decline in turnover test needs to be satisfied before an entity becomes eligible for the JobKeeper payment. Once this occurs there is no requirement to retest in later months. If an entity does not qualify for the month of April 2020 because its turnover has not been sufficiently affected, it can test in later months to determine if the test is met. This allows entities that only become affected part way through the six month period of operation of the JobKeeper scheme to continue to monitor for any decline in turnover until they qualify for the scheme in a later period.

The JobKeeper scheme aims to assist entities that have a significant decline in turnover due to the economic impacts of the Coronavirus. Accordingly, to properly target the JobKeeper payment to affected employers, section 8 of the Rules establishes a decline in turnover test that must be satisfied at the end of a fortnight for an employer to qualify. Once an entity satisfies this test it does not need to retest its turnover in later months.

The Rules specify two ways in which a business can satisfy the decline in turnover test: the basic test and the alternative test.

The basic decline in turnover test works by comparing the projected GST turnover of the entity for a period (the turnover test period) with its current GST turnover as calculated for a relevant comparison period (the comparison turnover). In effect this compares a month or quarter in the period the JobKeeper scheme applies with the corresponding period in 2019. For most businesses this will be an appropriate comparison to identify if turnover has declined significantly. An alternative test applies in certain circumstances (see below).

A business will generally satisfy the test where the GST turnover in the turnover test period falls short of the comparison turnover and the shortfall is 30 per cent or more.

However, larger businesses need to have a greater decline in turnover than smaller businesses to satisfy the basic decline in turnover test. This recognises the greater capacity of larger businesses to withstand the economic impacts of the Coronavirus. For a large business to satisfy the decline in turnover test, the GST turnover in the turnover test period must fall short of the comparison turnover and the shortfall must be 50 per cent or more.

For the purposes of the decline in turnover test, a large business is a business that:

- in the income year in which the test time occurs—is likely to have an aggregated turnover of $1 billion or more; or
- in the income year previous to the income year in which the test time occurs—has an aggregated turnover of $1 billion or more.

In this context, aggregated turnover has the same meaning as in section 328-115 of the *Income Tax Assessment Act 1997* and includes the annual turnover of an entity that is connected with or an affiliate of the business. In this way, a small business that forms part of a group that is a large business must have a 50 per cent decline in turnover to satisfy the test.

In order to reflect the important role of charities, an entity that is an ACNC-registered charity only needs to demonstrate a shortfall of 15 per cent. However, this lower shortfall percentage does not apply to ACNC-registered charities that are public or private universities (Table A or Table B providers within the meaning of the *Higher Education Support Act 2003*) or are schools within the meaning of the GST Act (that is pre-schools, primary schools, secondary schools and education for children with disabilities). These particular ACNC-registered charities must apply the basic turnover test that applies depending on the amount of their aggregated turnover. Although the rules use the broad definition of 'schools', other criteria for employers mean that government schools cannot be eligible employers (this is because they are covered by the exclusion, explained below, for Australian government agencies and their wholly-owned entities).

The periods for the turnover test period being compared by can be periods of one month or three months, where:

- if a one month turnover test period is being used, it must be one of the following months:
  - March 2020;
  - April 2020;
  - May 2020;
  - June 2020;
  - July 2020;
  - August 2020;
  - September 2020; or
- if a three month period is being used it must be one of the following periods:
  - the quarter that starts on 1 April 2020;
  - the quarter that starts on 1 July 2020.

Accordingly, for example, a business can make the comparison by comparing the whole of the month of March 2020 with March 2019, or by comparing the quarter beginning on 1 April 2020 with the quarter beginning on 1 April 2019. These periods align with the reporting periods for which GST registered businesses submit GST returns on their business activity statement and allow the Commissioner to examine changes in GST turnover that is reported.

The terms 'projected GST turnover' and 'current GST turnover' are defined in the GST Act (see sections 188-15, 188-20 and 195-1). In order for the decline in turnover test to operate as intended, the Rules apply those definitions with some modifications.

Projected GST turnover includes the value of all the supplies that an entity has made or is likely to make in the period. A supply is likely to be made where, on the balance of probabilities, it can be predicted that the supply is more likely than not to be made. The likelihood of a supply being made must be based on a reasonable expectation and considered in the context of the facts and circumstances of a particular business, such as by reference to the terms of a particular contract which requires supplies to be made in a certain period.

In general terms, for current GST turnover and projected GST turnover, the definitions in sections 188-15 and 188-20 of the GST Act apply as if subsection (1) of those sections refers to the period, rather than the month. The operation of subsections 188-15(2) and 188-20(2) (about members of GST groups) are disregarded. Also each external territory is treated as forming part of the indirect tax zone when working out both current GST turnover and projected GST turnover.

In addition, certain donations that ACNC-registered charities and gift deductible recipients receive or are likely to receive (including the non-monetary value of gifts) are also included in the calculation to work out the current GST turnover and projected GST turnover of these entities. This ensures that the decline in turnover test can apply appropriately to ACNC-registered charities and gift deductible recipients which may not make supplies for GST purposes or only limited supplies. This means that when such ACNC-registered charities or gift deductible recipients have a significant decline in donations they may qualify for the Scheme.

In particular, deductible gift recipients are required to include gifts received or likely to be received that are tax deductible to the donor under section 30-15 of the *Income Tax Assessment Act 1997*. ACNC-registered charities that are not deductible gift recipients must instead include gifts received or likely to be received that are made by way of monetary donations, property with a value of more than $5,000 and listed Australian shares. For either type of entity, gifts that they receive from an associate are not included in their turnover. This ensures that an increase to an entity's turnover from gifts they receive, or are likely to receive, are only taken into account where the gifts make a substantive change to the overall economic position of the entity and its related parties.

Businesses, individuals and entities that deliberately enter into contrived arrangements with the sole or dominant purpose of reducing their turnover in order to gain access to JobKeeper payments or increase the amount of JobKeeper payments they receive will not be entitled to the payment or the increased payment and the general interest charge will apply on the overpayment under section 19 of the Act. In addition, significant administrative as well as criminal penalties are also likely to apply to the parties involved in such schemes.

**Example 1: Satisfying the basic decline in turnover test**

> Burke Industries assesses its eligibility for JobKeeper payments on 11 May 2020 based on a projected GST turnover for May 2020 of $10 million from its business activities. The corresponding period is the month of May 2019 for which it had a current GST turnover of $20 million. The alternative turnover test does not apply as the month of May 2019 is an appropriate relevant comparison period. The May 2020 turnover falls short of the May 2019 turnover by $10 million, which is 50% of the April 2019 turnover. This exceeds the specified percentage of 30% that applies to business entities with less than $1 billion aggregated annual turnover, so the decline in turnover test is satisfied.

The alternative decline in turnover test applies if there is not an appropriate relevant comparison period in 2019. This might be the case for a new business, started for example in January 2020 or a business that made a major business acquisition in 2020. In both examples, the basic test may not accurately reflect the downturn in activity that the business has suffered.

Where the Commissioner is satisfied that there is no such period in 2019 or it is not an appropriate relevant comparison period, the Commissioner may, by legislative instrument, determine an alternative decline in turnover test applies to a class of entities.

Where such an alternative test applies to a business or non-profit body, the entity can meet the decline in turnover test by satisfying the alternative test determined by the Commissioner. It will be necessary for the affected entity to provide appropriate evidence to the Commissioner that it satisfies the alternative test.

The instrument making power is necessary to maximise flexibility and responsiveness to ensure that all entities that are intended to be assisted by the JobKeeper payment do in fact obtain the benefit of the payment. Paragraph 20(4)(a) of the Act provides that the Rules may confer on the Commissioner the power to make an instrument of a legislative or administrative character. However, any instrument made by the Commissioner would be a legislative instrument for the purposes of the *Legislation Act 2003* and would be subject to disallowance and parliamentary scrutiny.

**Example 2: Failing to satisfy the basic decline in turnover test**

> Nguyen Industries assesses its eligibility for JobKeeper payments on 3 July 2020 based on a projected GST turnover for the quarter beginning on 1 July 2020 of $80 million from its business activities. The corresponding period is the quarter beginning on 1 July 2019 for which it had a current GST

turnover of $100 million. The alternative turnover test does not apply as the quarter beginning on 1 July 2019 is an appropriate relevant comparison period. The July 2020 quarter turnover falls short of the July 2019 quarter turnover by $20 million, which is 20% of the July 2019 quarter turnover. This does not exceed the specified percentage for such entities of 30%, so the decline in turnover test is not satisfied.

**Example 3: Satisfying the alternative decline in turnover test**

Camille's Farms carries on a farming business and retail flower sales in Australia. It was subject to a severe drought from 2018 until September 2019 that reduced the amount of flowers it could grow. It returned to normal crop output in January 2020. Its retail flower sales became significantly affected in March 2020.

It assesses its eligibility for JobKeeper payments on 3 July 2020 based on a projected GST turnover from its farming activities for the quarter beginning on 1 July 2020 of $2,000,000. The corresponding period is the quarter beginning on 1 July 2019 – a period in which Camille's Farms was severely affected by drought. Because of the effects of the drought, Camille's Farms had a much lower than usual current (2019) GST turnover of $2,500,000. The July 2020 quarter turnover falls short of the July 2019 quarter turnover by $500,000, which is 25% of the July 2019 quarter turnover. This does not exceed the specified percentage of 30%, so the decline in turnover test is not satisfied.

However, because of the effects of the drought on farming businesses, the Commissioner is satisfied that there is not an appropriate relevant comparison period for an entity that carried on a farming business. Instead, for these entities, the Commissioner determines an alternative test for which the relevant comparison period is the corresponding quarter in 2017. The Commissioner determines that the alternative test will be satisfied in these circumstances where the entity can show a 30% shortfall in turnover (for entities with less than $1 billion aggregated annual turnover) when compared to one of these alternative periods.

In the quarter beginning on 1 July 2017, Camille's Farms had a current GST turnover of $4,000,000. This represents a shortfall of 50% when compared to its projected GST turnover for the quarter beginning on 1 July 2020. This exceeds the specified percentage of 30%, so the alternative decline in turnover test is satisfied.

**Example 4: Satisfying the alternative decline in turnover test**

Seb Tech is a start-up technology company that began carrying on a business on 1 October 2019 selling its product to a range of businesses including cafes and restaurants. Despite strong initial sales, its sales declined substantially from March 2020. It assesses its eligibility for JobKeeper payments on 15 April 2020 based on a projected GST turnover for April 2020 of $15,000 from its technology business. However, because Seb Tech did not begin to

carry on a business until 1 October 2019, there is no corresponding period in 2019 that applies.

As there is no corresponding comparison period in 2019, the Commissioner determines an alternative test under which the relevant comparison period is the average of the actual GST turnover in all of the months in which the business was being carried on prior to the turnover test period.

In October 2019 to March 2020, Seb Tech had an average monthly current GST turnover of $30,000. This represents a shortfall of 50% when compared to its projected GST turnover for April 2020 of $15,000. This exceeds the specified percentage of 30%, so the alternative decline in turnover test is satisfied.

*Major bank levy*

A qualifying employer cannot be an employer that was subject to the major bank levy in a quarter ending prior to 1 March 2020. The major bank levy is imposed by the *Major Bank Levy Act 2017* and is payable by authorised deposit-taking institutions with total liabilities of more than $100 billion on a quarterly basis.

The Rules further provide that an employer is not a qualifying employer if the major bank levy was imposed on another member of a consolidated group that it is a member of for any quarter ending before 1 March 2020. For example, if an employer is a small bank that is part of a consolidated group that includes an authorised deposit-taking institution that is subject to the major bank levy, then the small bank cannot be a qualifying employer.

*Government entities*

An Australian government agency is not a qualifying employer for the purposes of the JobKeeper payment. 'Australian government agency' is defined in section 995-1 of the *Income Tax Assessment Act 1997* as the Commonwealth, a State or a Territory or an authority of the Commonwealth, of a State or of a Territory. A 'local governing body', which is also defined in that Act, is also excluded from being a qualifying employer for the purposes of JobKeeper payment.

An entity that is wholly-owned by an Australian government agency or a local governing body is not a qualifying employer for the purposes of JobKeeper payment.

A sovereign entity is also not a qualifying employer for the purposes of JobKeeper payment. The term 'sovereign entity' takes its meaning from the *Income Tax Assessment Act 1997* and, generally, includes a body politic of a foreign country, a foreign government agency, and an entity wholly-owned by a body politic of a foreign country or foreign government agency.

*Liquidators and bankruptcy*

For the purposes of JobKeeper payment, an employer is not a qualifying employer if a liquidator or trustee in bankruptcy had been appointed. This reflects the intention that the JobKeeper Payment is intended to support entities that are continuing their

operations through the Coronavirus period or wishing to recommence their operations following the period.

Who is an eligible employee?

An employer is only entitled to a JobKeeper payment for a person for a fortnight if the person is an eligible employee. This reflects that the payment is a wage subsidy – it is intended to help employers to continue paying their employees during this period of downturn.

Section 9 of the Rules provides that an eligible employee of an employer for a JobKeeper fortnight is a person who satisfies the following requirements:

- On 1 March 2020:
  - the person was aged 16 years or over;
  - the person was an employee other than a casual employee of the employer, or was a long term casual employee of the employer; and
  - the person was an Australian resident (within the meaning of section 7 of the *Social Security Act 1991*), or was a resident of Australia for the purposes of the *Income Tax Assessment Act 1936* and was the holder of a Subclass 444 (Special Category) visa.
- At any time during the fortnight:
  - the person is an employee of the employer;
  - the person is not excluded from being an eligible employee. The exclusions relate to recipients of parental leave pay and dad and partner pay under the *Paid Parental Leave Act 2010,* and specified recipients of workers' compensation.

There is also a requirement that eligible employees have provided a notice to their employer agreeing:

- to be nominated by the employer as an eligible employee under the JobKeeper scheme as the employer with which the employee will participate in the JobKeeper scheme;
- that they confirm they have not agreed to be nominated by another employer; and
- that they do not have permanent employment with another employer if they are employed as a casual employee with this employer.

The requirement that casual employees cannot nominate with an employer if they were permanently employed by another employer at the time of nomination, ensures that an individual who is employed on a permanent basis (either full time or part time with an employer) must nominate their full time or part time employer under the scheme. This reflects that such employers are likely to be the individual's 'primary' employer, and prevents an individual from nominating a secondary, casual employment position if their primary employment is unaffected.

Individuals with one or more full time or part time jobs are free to nominate any one of those full time or part time jobs. Similarly, individuals with multiple long term casual jobs can nominate any one of those casual jobs.

The residency rules ensure that Australian residents who are working overseas for an Australian based business can be an eligible employee under the JobKeeper scheme if their employer elects to participate in the scheme and the overseas based Australian resident agrees to be nominated by the employer for the purposes of the scheme.

As with various tests relating to qualifying employers, the test for whether a person is an eligible employee involves applying two sets of criteria to the person at two discrete times: on 1 March 2020 and at a time during the relevant JobKeeper fortnight. This means there is no requirement for a person to satisfy all of the criteria on an ongoing basis (between 1 March 2020 and the end of a JobKeeper fortnight) in order to be considered an eligible employee for that fortnight.

Practically, this accommodates situations where a person's employment was terminated after 1 March 2020 and the person is subsequently rehired by their employer. This may occur for example, if prior to the announcement of the JobKeeper payment an employer did not expect to be able to pay its employees but with the support of the payment is able to rehire its employees.

A person who has been stood down or is on leave is considered to be an employee of their employer under the *Fair Work Act 2009* and for the purposes of the JobKeeper payment.

The two sets of criteria for when a person is an eligible employee are discussed in further detail below.

*Eligible employee test – 1 March 2020 requirements*

Subsection 9(2) of the Rules provides the requirements that must be met on 1 March 2020 for a person to be an eligible employee of an employer for a fortnight.

An employee who was younger than 16 years of age on 1 March 2020 is excluded from the JobKeeper payment scheme.

The requirement that an employee was employed on 1 March 2020 limits the JobKeeper payment to employees who were employed by the entity before it experienced significant downturn as a result of the Coronavirus. It also sets a limit on the employer's maximum number of employees (and therefore payment) under the JobKeeper scheme.

The requirement that a person was an employee (other than a casual employee) is intended to ensure there is a minimum level of connection between the employer and the employee. In an ordinary sense, an employee other than a casual employee is a full time or part time employee.

Subsection 9(5) of the Rules provides the meaning of 'long term casual employee' as a person who has been employed by the employer on a regular and systematic basis during the period of 12 months that ended on 1 March 2020. This definition is based on the same term in the *Fair Work Act 2009*, with adjustments to ensure it can be

applied to all employees (not just 'national system employees'). A casual employee is likely to be employed on a regular and systematic basis where the employee has a recurring work schedule or a reasonable expectation of ongoing work.

Casual employees who have not been employed on this basis between 1 March 2019 and 1 March 2020 therefore cannot be an eligible employee for the purposes of the JobKeeper scheme.

Subsection 9(6) of the Rules provides some flexibility for any changes in ownership of a business and movement of employees within the same wholly-owned group. It means that employees are not disadvantaged if these events, which are ordinarily beyond their control, occur.

A person can therefore be treated as an eligible employee of the same employer even if the business or non-profit body in which the person is employed changes hands after 1 March 2020. It also means that in working out if a person is a long term casual employee of an employer, employment in a business or non-profit body in the 12 month period ending on 1 March 2020 can be counted even if the business or non-profit body changed hands during that period.

**Example 5: Long term casual employees**

On 1 March 2019, Sam commences employment as a casual employee at Annie's Bakery. Sam has a regular work schedule – working between 3 and 4 days each week. On 1 July 2019, ownership of Annie's Bakery changes hands. Sam continues to be employed as a casual employee of Annie's Bakery and continues to work according to their regular work schedule from that date until 10 March 2020, when Sam is stood down.

For the purposes of determining whether Sam is a long term casual employee and an eligible employee, the fact that the business has changed hands will not disadvantage Sam. Sam is able to demonstrate regular and systematic employment at Annie's Bakery for over 12 months. He is therefore a long term casual employee for the purposes of the JobKeeper scheme.

Finally, a person will satisfy the residence requirements to be an eligible employee if, on 1 March 2020:

- the person was an Australian resident within the meaning of the *Social Security Act 1991*, that is, the person's usual place of residence was in Australia and the person was either an Australian citizen, the holder of a permanent visa, or the holder of a protected special category visa; or
- the person was a resident of Australia for the purposes of the *Income Tax Assessment Act 1936* and was the holder of a Subclass 444 (Special Category) visa.

The first part of the residence requirements broadly mirrors the residence rules for JobSeeker payment under the social security system. It is intended to generally limit eligibility for the new JobKeeper payment to persons who would otherwise be eligible to receive the JobSeeker payment if they were unemployed and satisfied the assets test.

In working out whether a person is an Australian resident within the meaning of the *Social Security Act 1991*, the ordinary meaning of the term 'reside' is relevant. The ordinary meaning of 'reside' is to 'dwell permanently, or for considerable time, to have a settled or usual abode, and to live in a particular place'. Some of the factors that can be used to determine residency status include physical presence, intention and purpose, family and employment ties, maintenance and location of assets, social and living arrangements.

A person who was a resident of Australia for tax purposes and was the holder of a Subclass 444 (Special Category) visa will also satisfy the residence requirements for JobKeeper payment. This is intended to apply to New Zealand citizens who have an established long term employment relationship with an Australian employer on 1 March 2020.

The definition of 'resident of Australia' in the *Income Tax Assessment Act 1936* is located in section 6 of that Act. The definition uses the ordinary concept of 'resident' (which is broadly equivalent to the 'resides' test in the *Social Security Act 1991*) as well as a number of extensions. These extensions include provisions that cause a person to be a resident of Australia for tax purposes in an income year if they physically present in Australia of 183 days or more of that year or if they have a domicile in Australia.

*Eligible employee test – JobKeeper fortnight requirements*

The requirement in paragraph 9(1)(a) of the Rules that a person was an employee of the employer during a fortnight is satisfied if the person was employed at any time during that fortnight. In other words, the person does not need to be employed for the full fortnight.

This ensures that an employer is eligible to receive a JobKeeper payment for a fortnight in respect of an employee who has been rehired or terminated at a point during the fortnight, provided the other eligibility and entitlement requirements are satisfied.

The nomination requirements in subsection 9(3) of the Rules require an employee to provide a notice in the approved form to their employer agreeing to be nominated by the employer for the purposes of the JobKeeper scheme. The employee must also specify in the notice that they have not agreed to be so nominated by any other employer or business. The purpose of this nomination is to assist employers to determine whether they may be entitled to JobKeeper payment in respect of the employee for a particular fortnight.

A person who is employed by one or more qualifying employers will need to choose one employer that will receive the JobKeeper payments for their employment.

Once an employee has nominated an employer and the employer has received JobKeeper payments in respect of the employee and has paid the employee, they cannot nominate a different employer. If for any reason, the employment relationship between an eligible employee and their nominated employer ends, the employee will not be able to have another employer qualify for the JobKeeper payments in respect of

their new employment. Such a person may become entitled to receive other Government support, including the JobSeeker payment.

If an employee has nominated more than one employer to receive the JobKeeper payment, the employee does not satisfy the nomination requirements required to be an eligible employee. This means that no employers will be able to nominate the person under the JobKeeper scheme in the future. If an overpayment results from an individual fraudulently nominating more than one employer, the individual will be jointly and severally liable to pay the overpayment and general interest charge on the overpayment under section 11 of the Act.

This approach prioritises maintaining an ongoing employment relationship over providing flexibility in the labour market during this crisis. It also minimises complexity for participants in the scheme and ensures that the integrity of the scheme is maintained. The Commissioner will also check compliance and ensure that employees have not nominated to participate with more than one employer.

*Eligible employee test – exclusions*

Even if a person satisfies the other components of the eligible employee test, they will not be an eligible employee if an exclusion under subsection 9(4) applies.

If, under the *Paid Parental Leave Act 2010*, parental leave pay is payable to a person, and the person's paid parental leave (PPL) period overlaps with or includes a fortnight in respect of which a JobKeeper payment may be paid, the person cannot be an eligible employee for JobKeeper for that fortnight. The same applies for a person who is paid dad and partner pay under the *Paid Parental Leave Act 2010* at any time during the fortnight.

These payments are provided to eligible parents by the Australian Government. As a statutory entitlement for eligible recipients, these payments will not be affected by the economic impact of the Coronavirus. Accordingly, recipients of parental leave pay or dad and partner pay in a fortnight cannot be an eligible employee for the JobKeeper payment in that fortnight.

If a person ceases to receive parental leave pay or dad and partner pay – for example, because they have received the full amount of the pay – and the person is otherwise an eligible employee of a qualifying employer, their employer may be able to receive JobKeeper payments for their employee.

This exclusion does not extend to any employer-funded paid parental leave that is outside the scope of the *Paid Parental Leave Act 2010*. This is because employer-funded paid parental leave schemes vary significantly in terms of the support that is provided by the employer. Accordingly, there could be unintended consequences if these recipients were excluded from being eligible employees for the purposes of the JobKeeper scheme.

Similarly, specified recipients of workers' compensation are excluded from being an eligible employee for a particular fortnight. This applies if:

- the person is totally incapacitated for work throughout the fortnight;

- an amount is payable to the person under or in accordance with an Australian workers compensation law in respect of the individual's total incapacity for work; and
- the amount is payable in respect of a period that overlaps with or includes the fortnight.

This is intended to capture a person whose entire wage is being paid under a workers' compensation scheme. Where this is the case, the person is not an eligible employee because the economic impact of the Coronavirus is unlikely to affect the financial support they receive under the workers' compensation scheme.

Where a person has some capacity to work in a particular fortnight, the person is not excluded from being an eligible employee for that fortnight. This is because the person's employer likely pays part of their wages in addition to any payments made under the workers' compensation scheme, or would be paying part of their wages if they were not stood down as a result of the Coronavirus. Accordingly, the JobKeeper payment should be available to the employer in these circumstances to support the employee, provided the other eligibility and entitlement criteria are satisfied.

What other entitlement criteria apply?

The rules about a JobKeeper fortnight, when an employer qualifies for the JobKeeper payment and when a person is an eligible employee are described above. In addition to these rules, section 6 contains further rules for when an employer is entitled to a JobKeeper payment in relation to their employees. These further entitlement rules are described below.

*The employer must satisfy the wage condition*

For each JobKeeper fortnight, the employer is only entitled to a JobKeeper payment if the employer has satisfied the wage condition. The wage condition is set out in section 10 of the Rules.

Generally, the wage condition requires that an employer pay each participating employee at least $1,500 for each JobKeeper fortnight. This reflects the practical operation of the JobKeeper scheme in which the JobKeeper payment is essentially a reimbursement to an employer of $1,500 where the employer has paid a participating employee at least that amount.

The component amounts that together must equal or exceed $1,500 are:

- amounts paid by the employer to the employee in the fortnight by way of salary, wages, commission, bonus or allowances (less PAYG withholding) – generally, this means the employee's income before tax;
- amounts withheld from payments made to the employee in the fortnight under section 12-35 in Schedule 1 to the *Taxation Administration Act 1953* – generally, this means amounts withheld by the employer for income tax or a HECS-HELP loan;
- contributions made in the fortnight to a superannuation fund or an RSA (retirement savings account) for the benefit of the employee, if the

contributions are made under a salary sacrifice arrangement (within the meaning of the *Superannuation Guarantee (Administration) Act 1992*); and

- amounts that, in the fortnight, are applied or dealt with in any way where the employee has agreed for the amount to be so dealt with in return for salary and wages to be reduced – generally, this means amounts forming part of salary sacrifice arrangements.

The requirement that the component amounts be at least $1,500 applies regardless of whether the employee ordinarily receives more or less than that amount. For example if an employee:

- ordinarily receives $1,500 or more in income per fortnight before PAYG withholding and other salary sacrificed amounts, and their employment arrangements do not change they will continue to receive their regular income according to their workplace arrangements. The JobKeeper payment will assist the employer to continue operating by subsidising all or part of the income of the employee;
- ordinarily receives less than $1,500 in income per fortnight before PAYG withholding and other salary sacrificed amounts, the employer must pay the employee at least $1,500 per fortnight, subject to PAYG withholding and other salary sacrificed amounts to the value of $1,500;
- has been stood down, the employer must pay the employee at least $1,500 per fortnight, before PAYG withholding and other salary sacrificed amounts to the value of $1,500; or
- was employed on 1 March 2020, subsequently ceased employment with the employer, and then has been rehired by the same eligible employer, the employer must pay the employee at least $1,500 per fortnight, before PAYG withholding and other salary sacrificed amounts to the value of $1,500.

If an employer's ordinary arrangement is to pay its employees less frequently than fortnightly, then the payment can be allocated between fortnights in a reasonable manner. For example, if an employer's ordinary arrangement is to pay an employee every four weeks, it may be reasonable for the purposes of satisfying the wage condition if the employee is paid at least $3,000 for every four week period.

The Rules provide that the Commissioner may treat a particular event that happened in a fortnight as having happened in a different fortnight or fortnights if the Commissioner's opinion is that it is reasonable to do so. For example, an employee may be accidently underpaid in a fortnight with the result that the employee is paid less than $1,500 in that fortnight, and then receives back pay in the next fortnight in recognition of the underpayment. If this occurs the Commissioner may decide that it is reasonable to treat the employee as having received at least $1,500 in the earlier fortnight. The Commissioner could make similar arrangements where an employer pays an employee monthly and an accidental underpayment has occurred, for example on a one off basis, and the Commissioner considered that it is reasonable to do so.

*Changes to superannuation guarantee obligations*

Further amendments will be made in respect of the superannuation guarantee rules. These changes are not provided for in these Rules as the Rules cannot modify the operation of the *Superannuation Guarantee (Administration) Act 1992*. The changes will instead be progressed separately through regulations to be made under that Act.

The regulations will ensure that an employer will only need to make superannuation contributions for any amount payable to an employee in respect of their actual employment, disregarding any extra payments made by the employer to satisfy the wage condition for getting the JobKeeper payment.

For example, if the work actually done by an employee over a period entitled them to be paid $1,000, but the employer instead paid them $1,500 to satisfy the wage condition for a JobKeeper fortnight, then the employer will only be required to make superannuation contributions in relation to $1,000. Similarly, any liability to superannuation guarantee charge that the employer would have for not making sufficient superannuation contributions would be calculated by reference to that $1,000 base.

An employer will still be required to make the same superannuation contributions for an employee whose pay exceeds the JobKeeper payment. For example, if an employee is entitled to be paid $2,000 for their work, the employer will continue to be required to make contributions in relation to that amount, irrespective of whether they were eligible to receive the JobKeeper payment in relation to the employee.

An employer will not be required to make superannuation contributions for an employee who is stood down. This is because employers have no obligation to pay stood down employees. If an employer pays a stood down employee $1,500 to satisfy the wage condition for receiving the JobKeeper payment, then the entire amount will be disregarded for superannuation guarantee purposes.

*The employer must elect to participate*

The JobKeeper scheme requires an employer to actively seek to participate in the scheme. An employer must therefore notify the Commissioner in the approved form of the employer's election to participate in the scheme before the employer can be entitled to a payment for a fortnight.

This election generally needs to be provided to the Commissioner before the end of a JobKeeper fortnight for the employer to be entitled to a payment for that fortnight.

However, there is a different timing rule where the employer wishes to participate in the scheme and receive the first or second JobKeeper payment (relating to the JobKeeper fortnights commencing on 30 March 2020 and 13 April 2020 respectively). Where this is the case, the employer has until the end of the second JobKeeper fortnight, that is, 26 April 2020, to provide the Commissioner with its election to participate. This gives employers more time to comply with the election requirement and means that fewer employers will miss out on receiving the first JobKeeper payment where it may be otherwise entitled to the payment as generally the scheme only applies prospectively to elections to participate.

For all subsequent JobKeeper fortnights, the employer will need to notify the Commissioner of the employer's election to participate in the scheme before the end of the particular fortnight.

Under section 388-55 in Schedule 1 to the *Taxation Administration Act 1953*, the Commissioner may also defer the timing for giving information in an approved form. Employers that have difficulty meeting the timing requirements may seek such a deferral from the Commissioner.

*The employer has not withdrawn their election to participate*

An employer is not entitled to the JobKeeper payment if they notify the Commissioner that they no longer wish to participate in the JobKeeper scheme. This notification must be made in the form approved by the Commissioner. An employer does not need to consult with or obtain the consent of its eligible employees if it no longer wishes to participate in the JobKeeper scheme.

*The employer must provide information about eligible employees and the wage condition*

To be entitled to a JobKeeper payment for a fortnight, the employer must have provided the following information to the Commissioner in the approved form:

- the details of each eligible employee; and
- other information about their entitlement to the JobKeeper payment.

It is anticipated that the Commissioner may require the following details for each eligible employee in the approved form:

- the name of the employee;
- the type of the employee's employment; and
- the employee's citizenship or residency status.

Once an employer has provided details of its eligible employees to the Commissioner, the employer must also notify each eligible employee within 7 days. This requirement is intended to keep eligible employees informed about the process.

If the information provided to the Commissioner does not subsequently change in the following JobKeeper fortnights, an employer is not required to provide the same information to the Commissioner again. However, where there is a change of circumstances – for example, a person who was an eligible employee for the previous JobKeeper fortnight is no longer an eligible employee for the relevant JobKeeper fortnight – the employer must notify the Commissioner of this in the approved form before the end of the relevant JobKeeper fortnight to satisfy the notification requirements for entitlement to a payment for that fortnight.

*Only one employer is entitled to JobKeeper payment for a person*

An entity is not entitled to the JobKeeper payment for an individual who is an employee (or business owner) if another employer is entitled (either as an employer or as a business owner) to a JobKeeper payment for the individual.

In circumstances where an individual has more than one employer, only one employer is entitled to a JobKeeper payment in relation to that individual. In circumstances where an employer seeks the agreement of an employee to participate in the JobKeeper scheme and that employee has already agreed to participate in the scheme in relation to his or her other employer, the employee should not accept the later nomination.

If an employee has agreed to be nominated to participate in the JobKeeper scheme as an eligible employee of their first employer and not their second employer, but the second employer receives payments for that employee, then the second employer will not have been entitled to those payments. If this occurs, the employer will be required to repay these payments as this is an overpayment under the Act. This will not affect entitlement to JobKeeper payments in relation to the employee for the employee's nominated (first) employer.

The taxation law contains administrative penalties that apply to a person who makes false or misleading statements to the Commissioner and other entities that are required or permitted by the taxation law. These penalties could apply to the notice provided by the employer to the Commissioner, and any statements made by an employee to the employer about whether they have agreed to be nominated by any other employer or other eligibility requirements such as residency or visa status.

**Division 3 - When is a business owner entitled to the JobKeeper payment?**

The JobKeeper payment established in Division 2 of the Rules entitles an employer to the JobKeeper payment with respect to its eligible employees. This could include a business owner who is an employee, including a sole trader, adult beneficiary of a trust, or a director or shareholder of a company. However, it will not include owners who are not employees such as sole traders, partners, adult beneficiary of trusts, or a director or shareholder of a company.

However, the JobKeeper scheme recognises that certain participants in a business, such as a sole trader, are also affected by the economic downturn caused by the Coronavirus. Accordingly, in order to provide a benefit to such business participants, the Rules in Division 3 extend the availability of the JobKeeper payment to certain participants in a qualifying business. The entitlement to the JobKeeper payment applies to businesses and is not available to non-profit entities.

Entitlement to a JobKeeper payment as a business participant (under section 11 of the Rules) operates similarly to entitlement to the payment as an employer (under section 6) with some additional integrity rules. Particularly:

- the fortnight must be a JobKeeper fortnight (subsection 6(5)); and
- the business must qualify for the JobKeeper scheme on or before the end of the fortnight (section 7).

These rules are described above in relation to the JobKeeper payment for employers.

In other respects, entitlement to a JobKeeper payment as a business participant differs from the rules for employers to take into account of differences in the relationship

between a business and a business participant (for example as sole traders and partners cannot be employees). These rules are described below.

*The entity must not be a non-profit body*

For the purposes of entitlement to a JobKeeper payment under Division 3 of the Rules, the entity must not be a non-profit body. This differs from the rules for entitlement to a JobKeeper payment based on paid employees where a qualifying employer may be a non-profit body.

*Notification*

An entity must notify the Commissioner of its election to participate in the JobKeeper scheme and the details of the nominated individual. Also, the entity must not have notified the Commissioner that the entity no longer wishes to participate in the JobKeeper scheme. Notification of this information must be made in the approved form.

*No more than one individual and one entity*

A business is not entitled to a JobKeeper payment under Division 3 of the Rules for more than one individual. If a business has more than one eligible participant, the business can only be entitled to receive the JobKeeper payment in relation to one of the individuals. It is up to the business to determine which individual is nominated as the eligible business participant.

Similarly, an individual can only create an entitlement for one entity. A business is not entitled to a JobKeeper payment for an individual if another business is also entitled under either Division 3 or Division 2 for the same individual. For example, where an individual is an eligible participant of two businesses – only one of those businesses is entitled to the JobKeeper payment in respect of that individual. Also, for example, where an individual is an eligible participant of a business and is entitled to a JobKeeper payment as an employee of another business–the business is not entitled to a JobKeeper payment in respect of the individual.

*Integrity rule*

The JobKeeper payment for an entity in respect of business participants is intended to support active businesses only. Division 3 contains integrity rules to support this intention.

The only entities that are entitled to a JobKeeper payment for business participants are those that had an ABN on 12 March 2020, or such later time that the Commissioner allows.

This discretion is only able to be exercised by the Commissioner for unintended situations where the entity was running an active business prior to 12 March 2020 but was not required to have an ABN to operate it. This will occur only in limited circumstances, such as in relation to businesses that are conducted in the external Territories. Businesses that only operate in the external Territories are not required to have an ABN as the no-ABN rules and GST does not apply within the external Territories. In order to be eligible for the JobKeeper payment they will need to obtain

an ABN. However as they cannot hold it on 12 March 2020, this provision provides the Commissioner with a limited discretion after the commencement of the Rules to allow these entities to hold an ABN later, and still be entitled to the JobKeeper payment. This discretion accordingly benefits affected businesses. It is envisaged that the Commissioner will release guidance outlining the limited circumstances in which this discretion is able to be used.

In relation to an entity that has an ABN, it is additionally required that:

- an amount was included in the entity's assessable income for the 2018-19 income year in relation to it carrying on a business and the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the amount should be so included; and
- the entity made a taxable supply in a tax period that applied to it that started on or after 1 July 2018 and ended before 12 March 2020 and the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the entity had made the taxable supply.

For the purposes of determining whether the entity made a taxable supply, it should be assumed that the entity is registered, the supply is neither GST-free nor input taxed, and the external Territories are part of the indirect tax zone. These terms have the meaning that they are given in the GST Act.

*Eligible business participant*

The individual for whom a business is entitled to the JobKeeper payment must be an individual that is an eligible business participant. Under section 12, an individual is an eligible business participant where the individual:

- is not employed by the business at any time in the fortnight (that is, because the individual is the owner of the business ie a nominated business participant not an employee of the business);
- satisfies the business participation requirements at any time in the fortnight;
- satisfies the 1 March 2020 requirements; and
- satisfies the nomination the requirements.

The business participation requirements are that, at any time in the fortnight, the individual is actively engaged in the business carried on by the entity. The individual must be actively engaged in the operations and activities of the body. Further, depending on the type of entity the business is, the individual must have a particular role within the business. In the case of an entity that is a:

- sole trader—the individual must be the entity;
- partnership—the individual must be a partner in the partnership;
- trust—the individual must be an adult beneficiary of the trust; and
- company—either a director or shareholder in the company.

The 1 March 2020 requirements are that, on that date, the individual:

- was aged 16 years or over;

- satisfied the business participation requirements (described above); and
- satisfied the Australian residency requirement.

The Australian residency requirement for the purposes of an eligible business participant is the same as the requirements that apply to an eligible employee (for entitlement to the JobKeeper payment as an employer). The residency requirement is described above in relation to Division 2 of the Rules.

The nomination requirements are that the individual has agreed to be nominated by the entity as an eligible business participant and has not agreed to be nominated by another entity. This reflects the intention that an individual can only entitle one business to receive the JobKeeper payment as a business participant. This individual must make this notification in the approved form. Further, the individual must not have given a nomination notice to any other entity – including in the individual's capacity as an employee of an employer seeking to obtain the JobKeeper payment for employers under Division 2 of the Rules. Also at the time of nomination as an eligible business participant the individual must not also be a permanent employee of an employer. This ensures that individuals do not qualify in relation to a business as an eligible business recipient if they have a separate permanent source of employment income. Individuals who have a permanent source of employment can nominate to receive the JobKeeper payment through their permanent employer.

A person is not an eligible business participant for a fortnight if parental leave pay is payable to the person, the person is paid dad and partner pay, or the person is incapacitated for work and an amount is payable to the person in accordance Australian workers' compensation law. These exclusions mirror those that apply in relation to determining whether a person is an eligible employee for purposes of Division 2, and are described in detail above.

**Division 4 and Division 5 - Payment and administration**

Divisions 4 and 5 of the Rules set out the conditions for payment of the JobKeeper payment and other rules relating to the administration of the JobKeeper scheme. Divisions 4 and 5 apply to a JobKeeper payment where entitlement has been established under Division 2 (entitlement based on employees) or Division 3 (entitlement based on business participation).

Payment

Under section 14, if the Commissioner is satisfied that an employer or business is entitled to a JobKeeper payment for a fortnight, the Commissioner must pay the employer or business the JobKeeper payment.

In being satisfied that an entity is entitled to a JobKeeper payment, the Rules provide that the Commissioner may accept, either in whole or in part, a statement in an approved form lodged with the Commissioner by the entity. This allows the Commissioner to have regard to statements made by the entity in relation to its entitlement. Where a statement made by an entity in support of its claims to entitlement leads to, for example, overpayment of a JobKeeper payment – then provision is made in sections 9, 10 and 11 of the Act to deal with the consequences of overpayment.

Under section 13, if the Commissioner is satisfied of an entitlement to a JobKeeper payment, the Commissioner must pay $1,500 to the employer for each eligible employee or to the business for its participating individual. Under section 15, the Commissioner must make the payment for a fortnight no later than the later of:

- 14 days after the end of the calendar month in which the fortnight ends; and
- 14 days after the Commissioner is satisfied that the employer or business is entitled to the payment for the fortnight.

This means that, while entitlement to a payment is assessed in relation to a JobKeeper fortnight and the amount is a fortnightly amount, an entitled employer or business will receive the JobKeeper payment monthly. For example, a participating employer with one eligible employee who qualifies for both fortnights in June 2020 will generally receive $3,000 by 14 July 2020.

The method of payment is dealt with in section 8 of the Act.

The Rules also make it clear that the payment of an amount by the Commissioner to an entity does not affect whether the entity is actually entitled to the amount. This ensures there is no doubt that the rules about overpayments in sections 9, 10 and 11 of the Act apply where an entity was not eligible to receive a particular amount paid to it.

*Transitional rule for first JobKeeper payment*

Subsection 14(3) of the Rules provides a transitional rule that allows the Commissioner to make an advance payment for the JobKeeper fortnights ending in the month of April without being satisfied that the entity is entitled to that payment under either section 6 or section 11 of the Rules.

This is necessary to ensure that payments in respect of the first and second JobKeeper fortnights (being the fortnights starting on 30 March 2020 and 13 April 2020 respectively) can be made quickly to assist entities affected by the Coronavirus.

However, before the Commissioner can make such an advance payment:

- the entity must have notified the Commissioner in the approved form of its election to participate in the scheme; and
- the Commissioner is satisfied, on the basis of the information provided by the entity in the approved form, that it is reasonable in the circumstances make the payment.

If the Commissioner subsequently determines that the entity was entitled to a lesser amount or a nil amount in respect of the relevant JobKeeper fortnights, then the overpayment rules in the Act would apply and the entity would be required to repay the overpaid amount.

Conversely, if the Commissioner subsequently determines that the entity was entitled to a greater amount, the Commissioner must make an additional payment to account for the difference.

Decisions and notification

Subsection 20(4) of the Act provides that the Rules may confer on the Commissioner the power to make a decision of an administrative character. Similarly, section 5 of the Act provides that the Commissioner has general administration of the Act. Accordingly, under the Rules, the Commissioner is the relevant decision maker with respect to an entity's entitlement to a JobKeeper payment. Section 13 of the Act provides for the review of certain decisions of the Commissioner through Part IVC of the *Taxation Administration Act 1953*.

Sections 17 and 18 of the Rules deal with notice being given to an entity regarding certain decisions of the Commissioner. Section 17 provides for when the making of a JobKeeper payment constitutes notice, and section 18 deals with a notice of decision of entitlement that the Commissioner is required to give to an entity.

Section 17 of the Rules provides that, in some circumstances, the Commissioner is taken to have given notice of a decision by making a payment. Payment constitutes notice if:

- an entity has notified the Commissioner that the entity elects to participate in the JobKeeper scheme (as required by paragraph 6(1)(e) or 11(1)(e)); and
- the entity has notified the Commissioner of details of one or more individuals (that is, eligible employees or an eligible business participant) for whom the entity is entitled to a JobKeeper payment for a fortnight (as required by subparagraph 6(1)(e)(ii) or 11(1)(e)(ii)); and
- the Commissioner has paid JobKeeper payments to the entity for those fortnights; and
- the sum of the amounts paid by the Commissioner is consistent with the Commissioner being satisfied that the entity is entitled to a JobKeeper payment for each individual about whom the Commissioner was notified for each relevant fortnight.

In these circumstances, the Commissioner is taken (for the purposes of subsection 12(2) of the Act) to have given the entity notice that the Commissioner is satisfied that the entity is entitled to a JobKeeper payment for each individual for each of the fortnights.

However, section 17 does not apply to payments made in respect of the first two JobKeeper fortnights. This reflects that payments can be made to an entity under the usual payment rules or under the transitional rule. It will not be possible for an entity that has provided the necessary information to the Commissioner to know on what basis the Commissioner has paid an amount to it. However, section 18 continues to apply.

Where the Commissioner pays an amount that is *not* consistent with being satisfied that the entity is entitled to a JobKeeper payment for each individual about whom the Commissioner was notified (including a nil amount), section 18 of the Rules requires the Commissioner to give an entity notice of a decision about that entity's entitlement. The Commissioner may need to give an entity notice of a decision that the entity:

- is entitled to a JobKeeper payment for an individual for a fortnight; or
- is not entitled to a JobKeeper payment for an individual for a fortnight.

The Commissioner is not required to give this notification in all instances. Rather, the Commissioner is only required to give this notification if:

- an entity has notified the Commissioner that the entity elects to participate in the JobKeeper scheme (as required by paragraph 6(1)(e) or 11(1)(e));
- the entity has notified the Commissioner of details of one or more individuals (that is, eligible employees or an eligible business participant) for whom the entity is entitled to a JobKeeper payment (as required by subparagraph 6(1)(f)(i) or paragraph 11(1)(f)); and
- the Commissioner pays an amount that is not consistent with being satisfied that the entity is entitled to a JobKeeper payment for each individual about whom the Commissioner was notified (including a nil amount).

The requirement that an entity has made the necessary notifications means that section 18 only applies to payments made under the transitional rule where the employer has provided all of the required information to the Commissioner.

Receiving notice in these situations ensures that an entity is able to ascertain which of their employees the Commissioner considered to be eligible or ineligible. This is particularly important for employers to know which employees they must continue to satisfy the wage condition for in respect of later JobKeeper fortnights. It also allow an entity to know which employees were determined to be ineligible by the Commissioner so that they can decide whether to seek a review of the Commissioner's decision.

Where the Commissioner is required to give this notification, the Commissioner must give the notice in writing as soon as practicable after making the relevant decision. Where a decision relates to more than one employee of an employer, the Commissioner may give notice to the employer of those decisions in one notice.

Compliance

There are a number of obligations imposed on participating employers and businesses under the JobKeeper scheme. For example, as described above, it must have paid at least $1,500 to each qualifying employee (subject to PAYG withholding and salary packaging) for each JobKeeper fortnight and must notify the Commissioner of changes in circumstances that would affect its entitlement to a JobKeeper payment.

Further, the Act sets out additional measures to ensure compliance with and administration of the scheme, including:

- an entity that receives an overpayment of the JobKeeper payment is required to repay the overpaid amount and a general interest charge to the Commonwealth, applying from the date of the overpayment;
- pre-application record keeping requirements and post-application record keeping requirements which participating entities must comply with; and

- a prohibition on contrived schemes aimed at falsely making an entity entitled to a JobKeeper payment or to an amount of payment to which it would not otherwise be entitled.

Monthly reporting

Under section 16, participation in the JobKeeper scheme requires monthly reporting. An entity that is entitled to a JobKeeper payment (within the meaning of section 7 of the Rules) for a fortnight must notify the Commissioner of:

- its current GST turnover for the reporting month; and
- its projected GST turnover for the following month.

All ACNC-registered charities and gift deductible recipients that are eligible for the JobKeeper payment must also report to the Commissioner the amount of certain donations that they have received in the past month and certain donations that they have received or expect to receive in the month in which the reporting time occurs. The particular donations that must be included are those that are included in working out their decline in turnover (see above).

The reporting month is a month in which there is a fortnight for which the entity is entitled to a JobKeeper payment. The report must be made to the Commissioner in the approved form, and must be made within 7 days of the end of the reporting month.

The information provided as part of this report does not affect an entity's eligibility, including in respect of the decline in turnover test (which only needs to be satisfied once). It is also not intended to verify whether the projection given as part of the decline in turnover test was accurate. Rather, it is intended to ensure that there is good information on which to assess the economic impact of the Coronavirus on a monthly basis across Australia.

Time limits for JobKeeper payments

JobKeeper payments are intended to only be available in respect of fortnights up to the fortnight ending on 27 September 2020, although payments may still be made in respect of those fortnights beyond this time.

While it is expected that most JobKeeper payments will be paid by October 2020, it may be appropriate for a payment to be paid to an entity beyond this time. For example, if an entity has satisfied all the entitlement requirements but has been underpaid by the Commissioner, a payment may be made after October 2020.

However, section 19 of the Rules provides that despite any entitlement to a payment that has not been made, the Commissioner must not make any JobKeeper payments after 30 September 2021. The Rules further provide that for any unpaid amount to which an entity would otherwise be entitled to, the entity is not entitled to that amount after 30 September 2021. These rules provide a cessation date for the JobKeeper scheme consistent with the intention that the scheme only applies on a time limited basis.

Later legislation

The operation of the JobKeeper scheme will be closely monitored to ensure that it provides an effective subsidy to the entities that it is intended to assist in the period of economic downturn caused by the Coronavirus. Compliance with the rules of the JobKeeper scheme will also be monitored. Where it is determined that changes to the JobKeeper scheme are necessary, relevant amendments will be made. Such changes may be necessary, for example, to remove an entitlement from an entity where it is determined that the entity has acted in a way which means that it should not receive or should not continue to receive the JobKeeper payment.

Accordingly, section 20 of the Rules make clear that any entitlement to JobKeeper payment may be cancelled, revoked, terminated, varied or made subject to conditions by or under later legislation.

**Application**

The Rules apply from their commencement immediately after the time they are registered. The JobKeeper scheme effectively ceases after the last JobKeeper fortnight – after 27 September 2020.

The Rules provides a wage subsidy to eligible businesses calculated by reference to the period from 30 March 2020 in relation to workers employed by the business on 1 March 2020. However, payments under the scheme and all obligations apply on a prospective basis after the commencement of the Rules and accordingly, there is no retrospective application.

**ATTACHMENT B**

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

*Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*

The *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (the Rules) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Rules**

The JobKeeper payment is a subsidy to businesses that is intended to keep more Australian workers in jobs through the course of the Coronavirus outbreak. The JobKeeper payment is aimed at maintaining the connection between employers and employees where the business goes into hibernation or closes down for six months. As the economy recovers from the challenges posed by the Coronavirus, it is intended that the connection maintained between employer and employee will enable business to recommence their operations quickly and productively.

Under the JobKeeper payment, qualifying employers will receive $1,500 per fortnight for each eligible employee. This amount, subject to PAYG withholding and salary packaging arrangements with the employee must have been paid in full to the eligible employee. The payment is made for up to 13 fortnights. A JobKeeper payment is also available to an owner of an entity that qualifies for the JobKeeper scheme.

The Rules establish the operation of the JobKeeper payment, including by specifying the eligibility requirements for employers and employees, the amount payable and the timing of payments, and other matters relevant to the administration of the payment.

**Human rights implications**

The Rules may engage the following human rights or freedoms:

*Privacy*

Article 17 of the *International Covenant on Civil and Political Rights* (the ICCPR) provides:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Participation in the JobKeeper scheme requires the provision of information to the Commissioner that may include personal information, including names, employment status, Australian residency status, and information relating to the turnover of a business. To any extent to which the provision of this information constitutes a

limitation of a person's right to be protected from interference with his or her privacy, the limitation is justified because the provision of information is:

- contingent on the affected person giving consent to the disclosure of information by nominating to participate in the JobKeeper scheme, or in the case of an employee, agreeing to be nominated;
- in pursuit of the legitimate objective identified–which is to respond to the economic downturn caused by the Coronavirus by providing a wage subsidy to affected businesses; and
- rationally connected and proportionate to the objective sought as the information is required to determine eligibility for the JobKeeper scheme and to ensure that it is administered according to the policy objective.

For these reasons, the Rules do not unnecessarily restrict a person's right to privacy.

*Family*

Articles 17 and 23 of the ICCPR and Article 10 of the *International Covenant on Economic, Social and Cultural Rights* (the ICESCR) provide protections to the family as the natural and fundamental group unit of society. These protections require measures to protect the family, including parental leave.

For the purposes of entitlement to a JobKeeper payment, an employee who, in a JobKeeper fortnight, receives parental leave pay or dad and partner pay (within the meaning of the *Paid Parental Leave Act 2010*) is not an eligible employee. Consequently, the employee does not entitle their employer to a JobKeeper payment and no amount needs to be passed on to the employee.

To the extent to which these employees are excluded from the benefit of the JobKeeper payment, the limitation is justified and rationally connected and proportionate to the objective. The objective is to assist employers to pay their employees during the period of economic downturn and to maintain the employment relationship throughout the period of the downturn. Where an employee receives parental leave pay or dad and partner pay, there is no cost to the employer to subsidise. The maintenance of the employment relationship is also guaranteed by those schemes.

For these reasons, the Rules do not unnecessarily limit the protections afforded to the family.

*Health*

Article 12 of the ICESCR provides for the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

For the purposes of entitlement to a JobKeeper payment, an employee who, in a JobKeeper fortnight, is incapacitated for work and receives a payment under an Australian worker's compensation law is not an eligible employee. Consequently, the employee does not entitle their employer to a JobKeeper payment and no amount needs to be passed on to the employee.

To the extent to which these employees are excluded from the benefit of the JobKeeper payment, the limitation is justified and rationally connected and proportionate to the objective. The objective is to assist employers to pay their employees during the period of economic downturn and to maintain the employment relationship throughout the period of the downturn. Where an employee receives a payment under an Australian worker's compensation law, there is no cost to the employer to subsidise. The maintenance of the employment relationship is also guaranteed by those schemes.

For these reasons, the Rules do not unnecessarily limit the protections afforded to the enjoyment of health.

*National origin*

The Rules may also engage the rights of equality and non-discrimination contained in Articles 2 and 26 of the ICCPR as the Rules broadly limit participation in the JobKeeper scheme to employees who are either Australian citizens, permanent residents or specified New Zealand citizens living in Australia. This includes New Zealand citizens living in Australia who may not be eligible for assistance under the social security system.

The differentiation of treatment is considered legitimate as it supports to the unique arrangements between Australia and New Zealand under the Trans-Tasman Travel Arrangement. To the extent that differentiation of treatment on the basis of national origin is applied to this cohort, it is considered reasonable and proportionate as it reaffirms the important role of the bilateral relationship between Australia and New Zealand.

For these reasons, the Rules do not unnecessarily restrict the rights of equality and non-discrimination based on national origin.

*Age*

The Rules may also engage the rights of equality and non-discrimination contained in Articles 2 and 26 of the ICCPR in relation to age. This may occur because the Rules limit entitlement to a JobKeeper payment in relation to an employee where the employee was aged at least 16 years on 1 March 2020. Accordingly, some in the working population–those aged under 16–cannot obtain the benefit of the JobKeeper payment.

Applying the benefit of the JobKeeper payment to workers over the age of 16 only is justified and rationally connected and proportionate to the objective as it is workers over the age of 16 who are financially independent and who require the security provided by participation in the JobKeeper scheme and the maintenance of the working relationship that it affords.

For these reasons, the Rules do not unnecessarily restrict the rights of equality and non-discrimination based on age.

**Conclusion**

The Rules are compatible with human rights. Importantly, the Rules positively engage the right to work as the JobKeeper scheme is aimed at assisting employers and keeping people in jobs.

The Real Estate Employers' Federation

# EMPLOYERS' ALERT

## JOBKEEPER WAGE SUBSIDY - PART 2

### Important information for our members

***Please note that if your business does not qualify for the JobKeeper subsidy then this information does not apply to your business***

Further to our e-mail to you last Friday regarding the JobKeeper scheme please see below further important information. These are set them out in Q&A style to reflect some of the questions REEF has been fielding from members.

### What are the steps involved in taking part in the JobKeeper scheme?

**Step 1** – Register your interest and subscribe for JobKeeper payment updates at https://www.ato.gov.au/Job-keeper-payment/ if you haven't already done so.

**Step 2** – Check you and your employees meet the eligibility requirements (refer to last Friday's REEF Employer Alert).

**Step 3** – Ensure you pay your employees for each JobKeeper fortnight you plan to claim for. The first fortnight is from 30 March – 12 April and each JobKeeper fortnight follows after that.

For the first two fortnight periods (30 March – 12 April, 13 April – 26 April), the Australian Tax Office (ATO) will accept the minimum $1,500 payment for each fortnight has been paid by you even if it has been paid late, **provided it is paid by you by the end of April**. This means that you can make two fortnightly payments of at least $1,500 per fortnight before the end of April, or a combined payment of at least $3,000 before the end of April.

Remember that you pay the employee first and then in the month following you get reimburse by the ATO.

**Step 4** – Notify your eligible employees that you are intending to claim the JobKeeper payment on their behalf and check they aren't claiming JobKeeper payment through another employer or have nominated through another business.
**Step 5** – Give the JobKeeper employee nomination form to your nominated employees to complete and return to you by the end of April if you plan to claim the JobKeeper payment for April. You don't need to lodge the forms – just keep them on file and provide a copy to your registered tax agent if you are using one.
**Step 6** – From 20 April 2020, you can enrol with the ATO for the JobKeeper payment using the Business Portal and authenticate with myGovID. You must do this by the end of April to claim JobKeeper payments for April.
**Step 7** – In the online form, provide your bank details and indicate if you are claiming an entitlement based on business participation, for example if you are a sole trader.
**Step 8** – Specify the estimated number of employees who will be eligible for the first JobKeeper fortnight (30 March – 12 April) and the second JobKeeper fortnight (13 April – 26 April).

## Can I exclude one or more of my employees from the application process?

**No.** Once you decide to participate in the JobKeeper scheme and your eligible employees have agreed to be nominated by you, then you must ensure that **all** of these eligible employees are covered by their participation in the scheme. This includes all eligible employees who are undertaking work for the employer or have been stood down.

You **cannot select** which eligible employees will participate in the scheme. This 'one in, all in' rule is a key feature of the scheme.

## What happens if my employee will not sign and return the application form?

If an employee refuses to sign the application form then the employee becomes ineligible for the scheme and you will not receive the JobKeeper subsidy for that employee. An employee cannot be forced to sign the form.

### Am I obligated to pass the payment on to a commission-only employee despite that employee not normally receiving any wages?

**Yes.** A central part of the JobKeeper scheme is creating an obligation on employers who receive a JobKeeper payment to ensure that it is paid to the applicable eligible employee. Therefore, you must pay it to a commission-only employee if you receive it for them.

### Is there any way for me to 'claw back' or withhold the JobKeeper payment through the payment of commission to commission-only employees?

**No.** There is no mechanism in the REEF template commission-only agreements or the Real Estate Industry Award for JobKeeper payments to be subject to 'clawback' or recovery through the commissions paid to commission-only employees.

### When I pay the JobKeeper subsidy to my commission-only employees, does the amount paid contribute to the MITA that the employee has to annually achieve?

**Yes**. If you pay JobKeeper payments to a commission-only employee, then for the purposes of the MITA it is considered income and therefore contributes to the MITA that the employee has to annually achieve.

### Am I obligated to increase the wages paid to an employee in circumstances where they are being paid less than $750/week (say for part timers or casuals)?

**Yes.** You are obliged to make payment **of at least $750** per week or $1,500 per fortnight to comply with the rules of the JobKeeper scheme.

### Can I increase the hours of a part time employee to ensure that the hours worked reflect the JobKeeper subsidy?

**No.** While you can make various types of JobKeeper enabling directions to an eligible employee (refer to last Friday's REEF Employer Alert) under the recent amendments to the Fair Work Act they **do not** enable you to increase an employee's working hours.

## Can an employer continue to debit a debit/credit salesperson the full amount of their wages (which includes the JobKeeper payment) and allowances when calculating commission payments?

**Yes.** Provided the employee's written commission structure contains appropriate "debiting" arrangements. REEF's template debit-credit commission structures contain such a provision.

Remember, you can only debit what has actually been paid to the salesperson.

### Questions

**If you have any questions concerning this information please email admin@reef.org.au (rather than calling the helpline)**

The Real Estate Employers' Federation

# EMPLOYERS' ALERT

## JOBKEEPER WAGE SUBSIDY

### Important information for our members with commission only employees

***Please note that if your business does not qualify for the JobKeeper subsidy then this information does not apply to your business***

In addition to our Employer Alert last Monday REEF has received updated legal advice further clarifying the payment of the JobKeeper subsidy to commission-only employees.

This updated advice reflects a clarification issued by the Fair Work Commission as to what satisfies an allowable payment under the JobKeeper scheme. In particular, the total payment of $1,500 can include the payment of, among other things, **commission**.

The advice states:

***"If an eligible employer makes a commission payment to an eligible employee in a particular fortnight that exceeds $1,500 then the employer is not obliged to make an additional JobKeeper payment to the employee.***

***Where no commission payment is made in a specific fortnight, then the minimum JobKeeper payment of $1,500 must be made.***

***If a commission payment is made that is less than $1,500 in the specific fortnight, then the eligible employer can use the monies paid to it under the JobKeeper scheme to top up the total value paid to the eligible employee to be no less than $1,500 per fortnight"***

**Example 1:** Henry is a commission-only employee and is an eligible employee under the Jobkeeper scheme. Henry's employer is an eligible employer and has registered to receive Jobkeeper payments for Henry commencing the month of April 2020.

Henry is due to be paid a settled commission of $10,000 on the 24th April from a sale he made in February 2020. As the commission payable to Henry is in excess of the $1,500 fortnightly JobKeeper subsidy, the payment to Henry will satisfy the JobKeeper obligations **for that fortnight only**.

Therefore, other than the commission, no additional payment needs to be paid to Henry for that fortnight.

**Example 2:** Billy is a commission-only employee and is an eligible employee under the Jobkeeper scheme. Billy's employer is an eligible employer and has registered to receive Jobkeeper payments for Billy commencing the month of April 2020.

Billy is due to be paid a settled commission of $900 (plus super) on the 24th April from a sale he made in February 2020. As the commission payable to Billy is less than the $1,500 fortnightly Jobkeeper subsidy, the payment to Billy will not satisfy the Jobkeeper obligations for that fortnight.

Therefore, the employer would need to pay Billy an additional payment of $600 **for that fortnight** to satisfy the JobKeeper obligation.

## Questions

**If you have any questions concerning this information please email admin@reef.org.au (rather than calling the Helpline)**

# 5676.0.55.003 - Business Indicators, Business Impacts of COVID-19, April 2020

Previous ISSUE Released at 11:30 AM (CANBERRA TIME) 04/05/2020

## Business Response to JobKeeper Payment Scheme

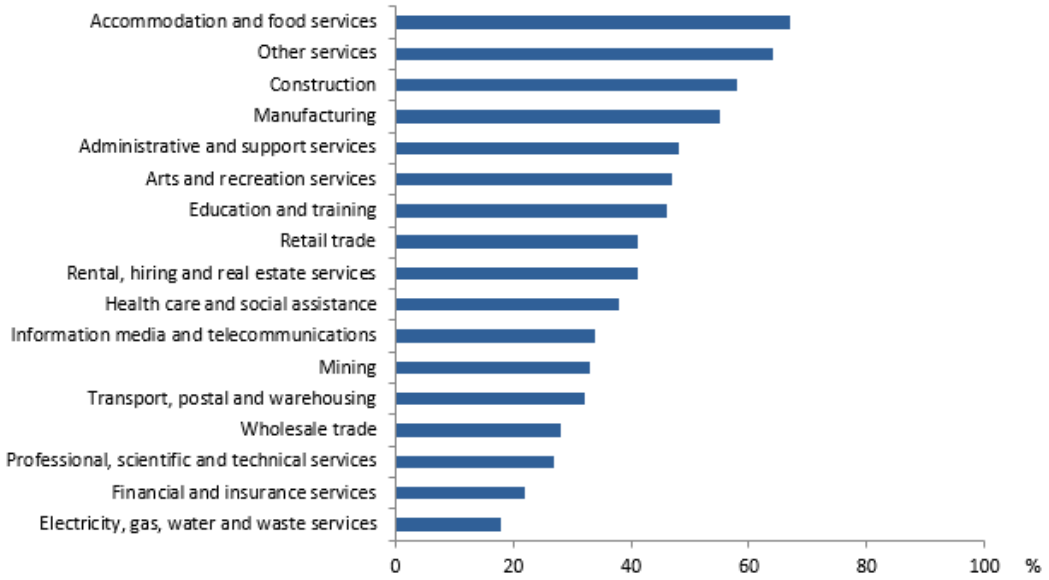
### Employment intention decisions

More than two in five businesses (44%) reported that the announcement of the JobKeeper Payment scheme influenced their decision to continue to employ staff.

A greater proportion of small (0-19 persons) and medium businesses (20-199 persons) (both 45%), compared to large businesses (200 or more persons employed) (32%), reported that the JobKeeper Payment scheme influenced their decision to continue to employ staff.

Businesses in Accommodation and food services were the most likely to report the JobKeeper Payment scheme having influenced their employment decisions (67%).

**Employment decisions influenced by the JobKeeper Payment scheme, proportion of businesses by industry[(a)]**




(a) Proportions are of all businesses.

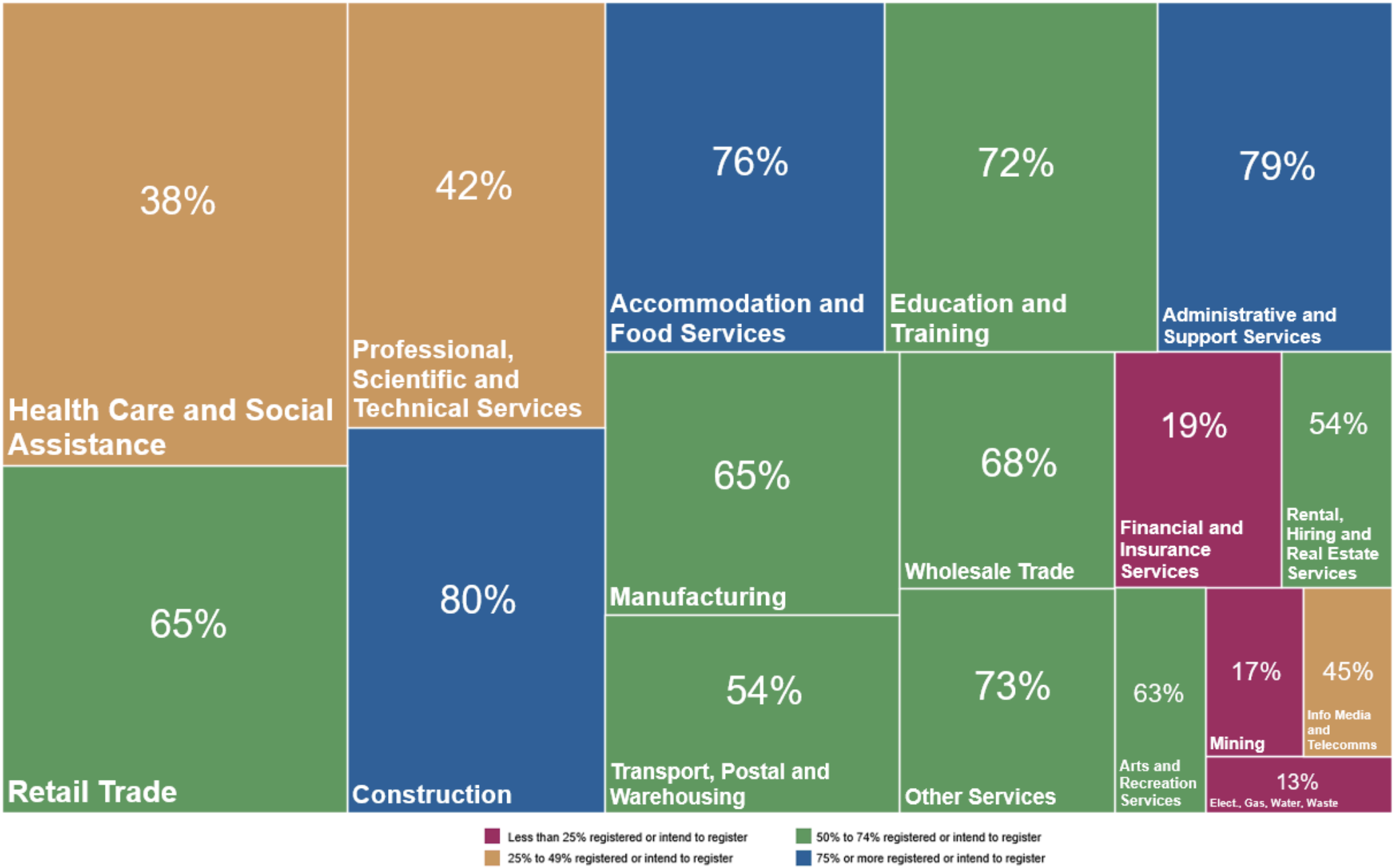
**JobKeeper Payment scheme registration**

Three in five businesses (61%) reported having registered or intending to register for the JobKeeper Payment scheme.

By business size, 61% of small, 60% of medium and 45% of large businesses reported having registered or intending to register for the JobKeeper Payment scheme.

The area of each segment in the diagram below shows the relative share of each industry division of total jobs. The figures within the segments represent the proportion of businesses in each industry that have registered or intend to register for the JobKeeper Payment scheme.

**Industry share of total jobs[(a)] and the proportion of businesses that registered or are intending to register for the JobKeeper Payment scheme[(b)]**

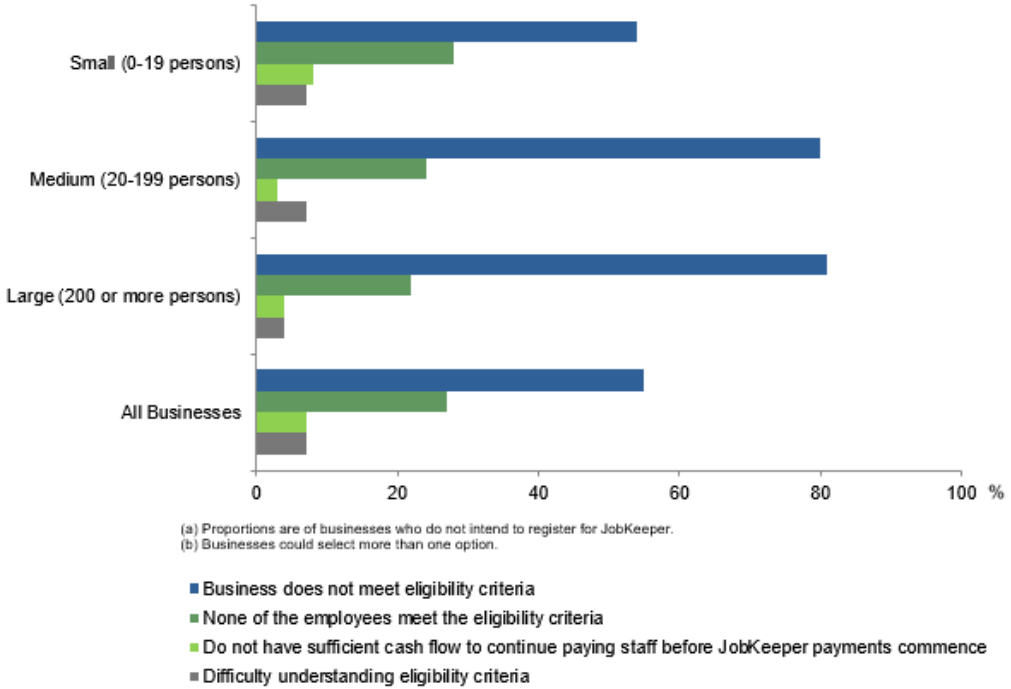



(a) ABS Cat. No. 6150.0.55.003 - Labour Account Australia, Quarterly Estimates, December.
(b) Proportions are of all businesses.

Four in five businesses in the Construction industry have registered or intend to register for the JobKeeper Payment scheme; this industry represents 8% of total jobs in the economy. By contrast, while the Health care and social assistance industry has the highest share of total jobs in the Australian economy (13% of total jobs), less than half of all businesses in this industry reported having registered or intending to register for the JobKeeper Payment scheme.

**Reasons for not registering for the JobKeeper Payment scheme**

**Reasons for not registering for the JobKeeper Payment scheme, by employment size[(a)(b)]**




Of those businesses that do not intend to register for the JobKeeper Payment scheme (33% of all businesses), the most common reason reported was that the business does not meet the eligibility criteria (55%); large businesses were most likely to report not meeting the eligibility criteria (81%).

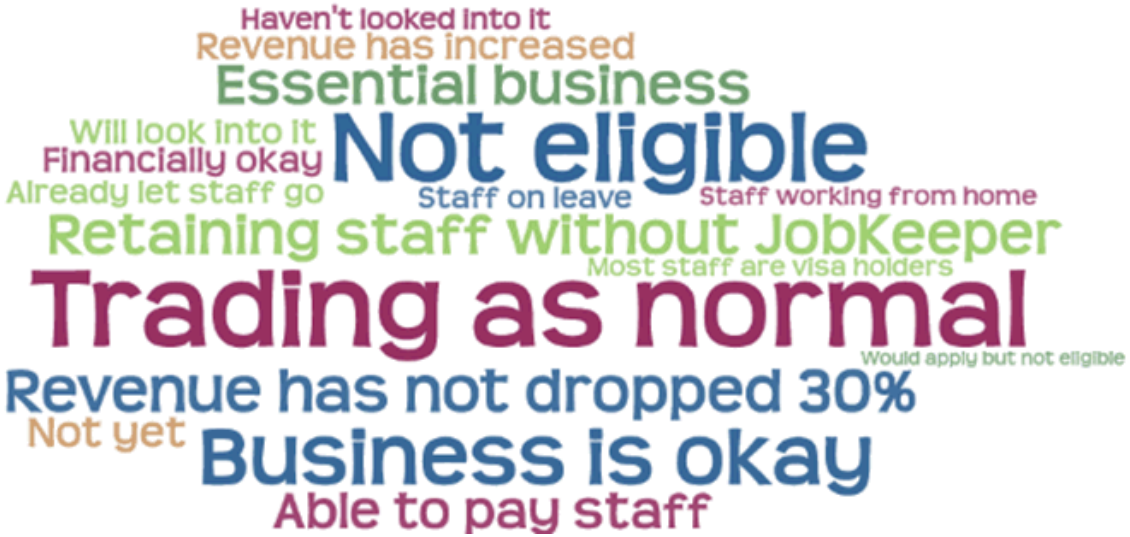
By business size, small businesses were most likely to report insufficient cash flow (8%) as a reason for not intending to register for the JobKeeper Payment scheme.

By industry, of those businesses that do not intend to register for the JobKeeper Payment scheme:

- businesses in Education and training (97%) were the most likely to report that the business does not meet the eligibility criteria;
- three in five businesses in Arts and recreation services (58%) reported that none of their employees meet the eligibility criteria;
- a quarter of businesses in Education and training and Information media and telecommunications (both 24%) reported that they do not have sufficient cash flow to continue paying staff before JobKeeper payments commence; and,
- difficulty in understanding the eligibility criteria was most likely to be reported by businesses in Other services (19%) and Accommodation and food services (19%).

**Reasons for not registering for the JobKeeper Payment scheme**

A range of additional comments were provided by the 33% of businesses that reported that they did not intend to register for the JobKeeper Payment scheme. Presented below are comments from those that reported that their business was not eligible. The bigger and bolder words reflect the more common themes identified by businesses.

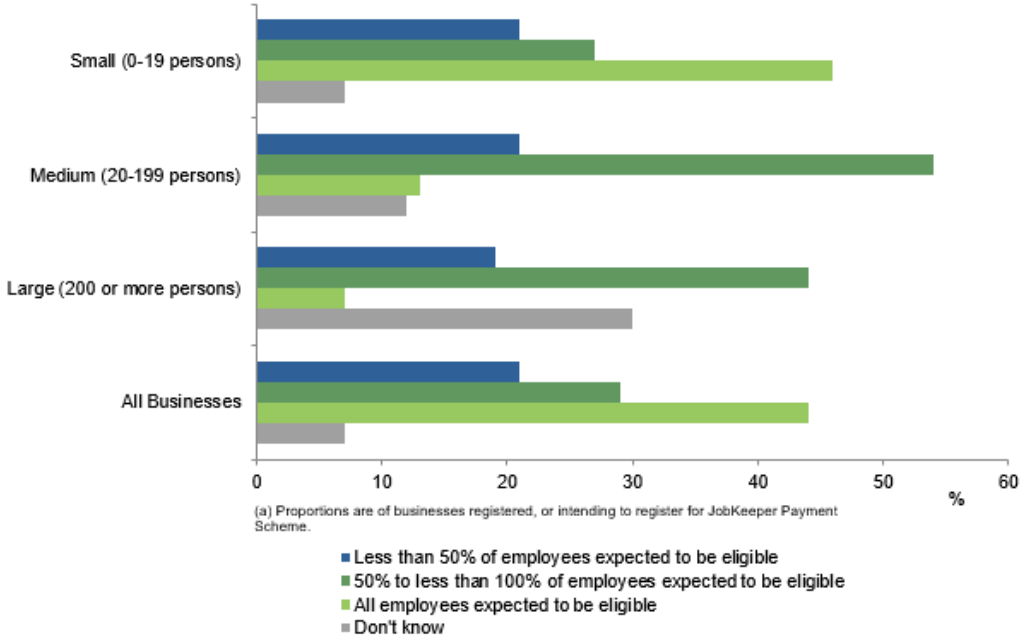



**JobKeeper Payment scheme – expected employee eligibility**

Of businesses that reported having registered or intending to register for the JobKeeper Payment scheme:

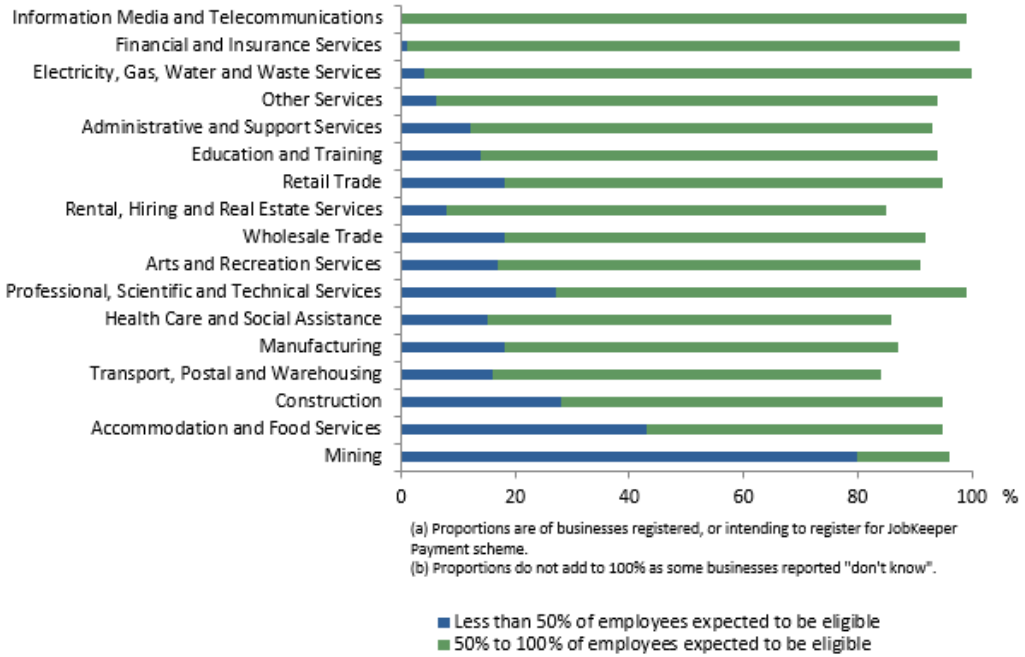
- 44% expected all of their employees to be eligible for the scheme;
- 29% expected more than half their employees to be eligible for the scheme; and,
- 21% expected less than half of their employees to be eligible for the scheme.

**Proportion of business' employees expected to be eligible for the JobKeeper Payment scheme, by employment size[(a)]**




Of businesses registered or intending to register for the JobKeeper Payment scheme, 46% of small businesses, 13% of medium businesses and 7% of large businesses reported that they expected all of their employees to be eligible for the scheme.

**Proportion of business' employees expected to be eligible for the JobKeeper Payment scheme, by industry[(a)(b)]**




Industries with the highest proportion of businesses that expected more than half their employees to be eligible for the JobKeeper Payment scheme were:

- Information media and telecommunications (99%);
- Finance and insurance services (97%); and
- Electricity gas water and waste services (96%).

---

This page last updated 28 May 2020